CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. ~~198~~ 205.

EMANUEL FELSENHELD, CLAIMANT OF 288 PACKAGES OF MERRY WORLD TOBACCO, PLAINTIFF IN ERROR,

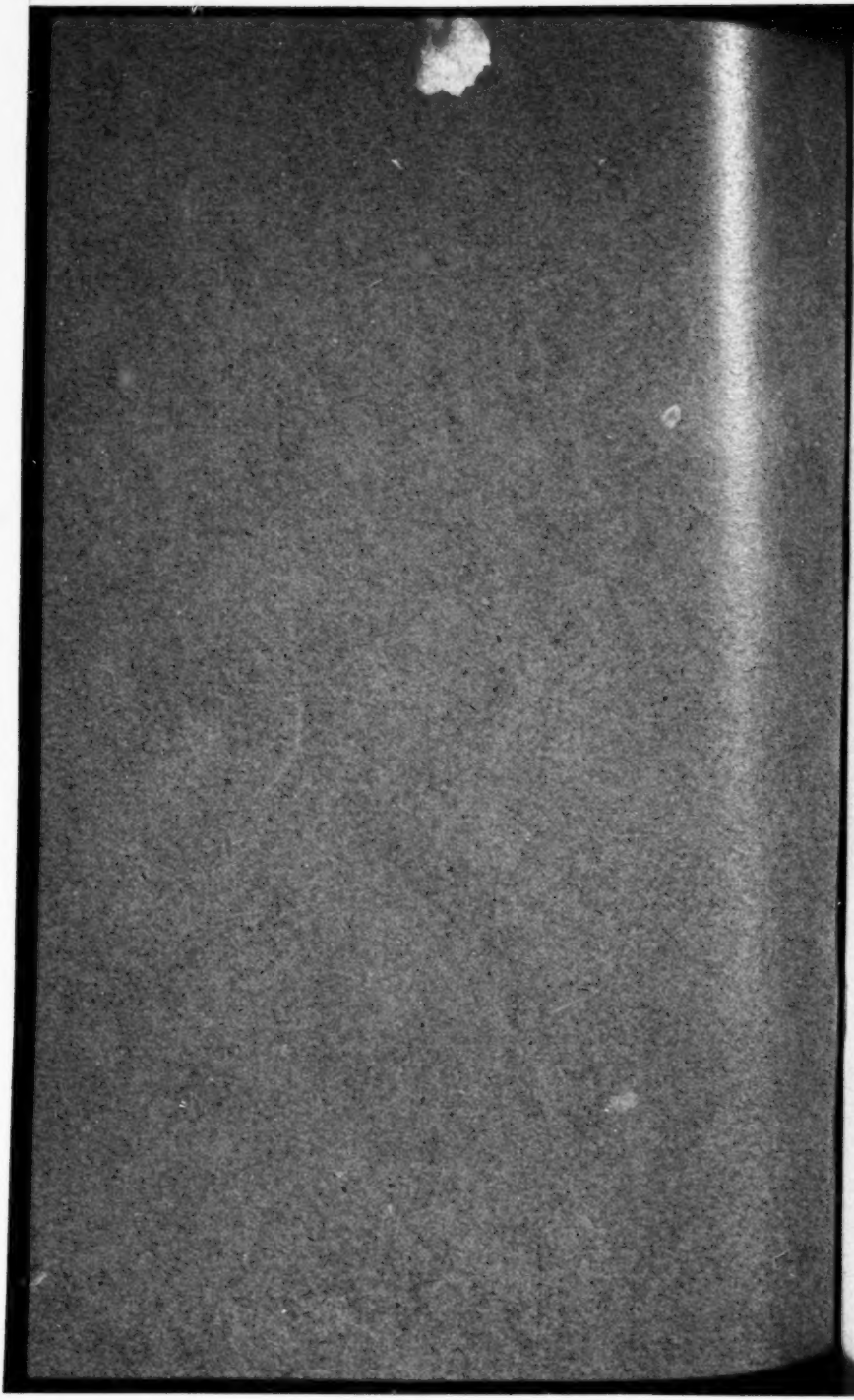
vs.

THE UNITED STATES.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

FILED DECEMBER 6, 1900.

(17,984.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 14, 1900.

a EMANUEL FELSENHELD, Claimant of 288 Packages of Merry World Tobacco, Plaintiff in Error,
versus
UNITED STATES OF AMERICA, Defendant in Error.

On certificate from the United States circuit court of appeals for the fourth circuit, at Richmond.

Henry M. Russell, Wheeling, W. Va., and John De Witt Warner, 111 Broadway, N. Y., counsel for plaintiff in error.

Chas. J. Faulkner, Kellogg bldg., Washington, D. C., and Joseph H. Gaines, U. S. att'y, Charleston, W. Va., counsel for defendant in error.

1 United States Circuit Court of Appeals, Fourth Circuit.

EMANUEL FELSENHELD, Claimant of 288 Packages of "Merry World Tobacco," Plaintiff in Error,
versus
THE UNITED STATES OF AMERICA, Defendant in Error. } No. 379.

In error to the district court of the United States fo- the district of West Virginia, at Martinsburg.

This is to certify that on the 17th day of October, in the year 1898, in the district court of the United States for the district of West Virginia, the United States of America, through its attorney, filed its information against five cases, each containing 288 packages of chewing and smoking tobacco, known by the name and brand of "Merry World tobacco," then in the custody of the collector of internal-revenue for the said district, having been seized by such collector; that this information contained two counts, one alleging that at the time of said seizure the said packages and each of them had packed in, attached to, and connected with them a certain article other than the manufacturer's wrappers and labels, the internal-revenue stamp, and the tobacco—that is to say, a small slip of paper called a coupon. This coupon was fully described in this count of the information and is particularly set forth in

2 *in* the agreed statement of facts hereinafter contained.

The second count of the information alleged that each of the said packages had affixed to, branded, stamped, marked, and printed upon the contents of said packages and each of them certain promises and offers of and orders and certificates for certain gifts, prizes, premiums, payments, and rewards; which promises, offers, orders, and certificates were those contained in the said coupon already referred to.

It is also certified that on the same day Emanuel Felsenheld, through his attorney, intervened, claiming to be the owner of the tobacco which had been seized, insisting that the seizure was not justified by law and asking leave to defend, and he was thereupon permitted to do so.

It is further certified that an agreement of the facts was entered into between the United States and the claimant, and that the facts set forth in this agreement were those on which the district court heard and determined the case, there being no evidence introduced, except this agreed statement of facts was in the following words:

Agreed Statement.

It is agreed by and between the United States of America, through Joseph H. Gaines, the district attorney of the United States for the district of West Virginia, on the one part, and Emanuel Felsenheld, by Henry M. Russell, his attorney, on the other part, that upon the trial of the above-entitled case the statements herein contained may be treated as facts and may be considered by the court and jury before whom the case shall be tried, and that it shall not be necessary for either party to introduce in proof of the said facts or of any of them any evidence except this agreement; but as to the several documents and expressions of opinion by departmental officers hereinafter contained, the genuineness of said documents and the fact said expressions of opinion were made is admitted, and not the relevancy of said documents and expressions, nor the truth of any facts stated in them, nor the correctness of any such opinions.

3 On the 23rd day of September, in the year 1898, at the city of Wheeling in the district aforesaid, the internal-revenue collector of the United States did seize 1,440 packages of chewing and smoking tobacco known by the name and brand of Merry World tobacco, weighing one and two-thirds ounces to the package and having a total weight of 150 pounds, and that afterwards, on the 5th day of April, in the year 1899, J. K. Thompson, the marshal of the United States for the said district of West Virginia, in pursuance of the attachment and monition appearing in the record of this case, took into his possession the said 1,440 packages of tobacco and now holds the same in his possession.

At the time of the seizure of the said tobacco by the said White, there was in each of the said packages a small slip of paper called a coupon with printed words and figures on both sides thereof, which coupon had been placed within such package at the time when it was packed in the manufactory and prepared for sale. These coupons were all alike and on each of them were the following words and figures, that is to say, upon one side thereof the following words and figures:

"*Merry World Tobacco Coupon.*

"With the tobacco packed herewith the purchaser has bought a definite share in any of the articles mentioned on the other side of this voucher.

"We will send you postpaid any or all of the articles listed on the other side for the number of coupons as stated.

"Mail these coupons to the Merry World Tobacco Co., Wheeling, W. Va., stating number of coupons sent, articles wanted, your name, treet and number, city or town, county and State."

On the other side of the coupon were the following words and figures:

"Will send you postpaid for

"20 coupons, 1 picture, 14 x 28, handsome water-color fac-simile, 12 subjects.

4 "30 coupons, 1 picture, 20 x 24, fine pastel fac-simile, 12 subjects.

"40 coupons, 1 picture, 20 x 30, beautiful Venetian scenes, 4 subjects.

"50 coupons, 1 picture, 22 x 28, elegant water-color gravures, 2 subjects.

"60 coupons 1 picture, 22 x 28, magnificent water-color gravures, 4 subjects.

"No advertising or lettering on any of the above. Such excellent works of art have never before been offered, except through dealers, at very high prices. They are suitable decorations for the most elegant home, and to be appreciated must be seen. See descriptive catalogue mailed on application. Order by subjects.

"20 coupons, 1 book of Popular Seaside Library, 300 titles by favorite authors.

"50 coupons, 1 cloth-bound book, 160 titles, by eminent authors. Catalogue of our books mailed on application.

"25 coupons, 1 scarf-pin solid sterling silver.

"25 coupons, 1 pipe, genuine French briar.

"40 coupons, 1 rubber tobacco pouch, self-closing.

"75 coupons, 1 elegant pocketbook, finest quality leather, gent's or ladies.'

"70 coupons, 1 pocket-knife, first quality American manufacture, razor-steel hand-forged, finely tempered blades. Stag handle. Your choice between jack-knife or pen-knife.

"95 coupons, 1 fine razor, highest-grade steel, hollow-ground.

"40 coupons, 1 bicycle lock, nick-led, gent's sprocket or lady's with chain.

"150 coupons, 1 cyclometer, 1,000 miles repeating. In ordering state size of wheel.

"550 coupons, 1 excellent open-face watch. Guaranteed without qualification. Has all improvements up to date. It will wear and perform well for a lifetime if only ordinarily cared for.

"Illustrated catalogue for the above mailed upon application."

5 One of the coupons aforesaid taken out of one of the said packages is hereto attached. The said coupon is printed on thin paper, is of inappreciable weight, is without any intrinsic value in itself and has upon it no picture of any kind and does not affect in any way the ascertaining of the proper tax payable upon the package or interfere in any way with the collection of such tax. The value of the said five cases of tobacco of 288 packages each, is and was when they were seized as aforesaid fifty-four dollars ($54.00). And the said packages were when seized owned by Emanuel Felsenheld.

The practice of packing similar coupons in similar packages of

tobacco manufactured and packed for sale and of selling such packages throughout the country has been followed by a number of different manufacturers for ten or more years.

During some portions of the same period a practice was followed by some manufacturers of packing in their packages of tobacco other articles having some intrinsic value, such as pen-knives, pictures and other things.

These practices and their relation to the administration of the revenue laws have been at various times presented for consideration to the Commissioner of Internal Revenue of the United States and other officers of the Government.

On the 4th day of November, in the year 1891, Honorable John W. Mason, then Commissioner of Internal Revenue of the United States, issued to collectors of internal revenue a circular of which the following is a copy:

"*Circular No.* 371.

"Marks and contents of packages of tobacco.

"TREASURY DEPARTMENT,
"OFFICE OF INTERNAL REVENUE,
"WASHINGTON, D. C., *November* 4, 1891.

"To the collectors of internal revenue:

"Manufacturers of tobacco, in marking the gross, tare, and net weight of packages of tobacco, should include in the gross the full weight of the package and all its contents. The tare should include the weight of the pail, lining, covering, etc., so that the tare
6 subtracted from the gross will give the net weight of the tobacco contained therein and expressed by the stamp. Great care should be exercised by collectors to prevent foreign articles of any kind being included in the packages. A practice has grown up, which seems to be on the increase, by which manufacturers have included in statutory packages many foreign articles. This practice should be discontinued. A package of tobacco means a package containing tobacco and nothing else.

"You will please notify the manufacturers in your district of the necessity hereafter for a full compliance with the terms of this circular.

"JOHN W. MASON,
"*Commissioner.*"

On the 24th day of July, in the year 1897, Honorable W. S. Forman, then Commissioner of Internal Revenue of the United States, issued a circular of which the following is a copy:

"*Relative to the Provisions of the Act of July 24, 1897, as to Tobacco, Cigars, and Cigarettes.*

"1897.

"Department circular No. 106, internal revenue No. 477.

"TREASURY DEPARTMENT,
"OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
"WASHINGTON, D. C., *July* 24, 1897.

"The attention of collectors of internal revenue and other officers is called to section 10 of the act of July 24, 1897, entitled 'An act to provide revenue for the Government and to encourage the industries of the United States,' which provides as follows:

"SEC. 10. That section thirty-three hundred and ninety-four of the Revised Statutes of the United States, as amended, be and the same is hereby further amended, so as to read as follows:

7 "'Upon cigars which shall be manufactured and sold, or removed for consumption or sale, there shall be assessed and collected the following taxes, to be paid by the manufacturer thereof: On cigars of all descriptions made of tobacco, or any substitute therefor, and weighing more than three pounds per thousand, three dollars per thousand; on cigars, made of tobacco, or any substitute therefor, and weighing not more than three pounds per thousand, one dollar per thousand; on cigarettes, made of tobacco, or any substitute therefor, and weighing more than three pounds per thousand, three dollars per thousand; on cigarettes, made of tobacco, or any substitute therefor, and weighing not more than three pounds per thousand, one dollar per thousand: Provided, that all rolls of tobacco, or any substitute therefor, wrapped with tobacco, shall be classed as cigars, and all rolls of tobacco, or any substitute therefor, wrapped in paper or *or* any substance other than tobacco, shall be classed as cigarettes.

"'And the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall provide dies and adhesive stamps for cigars weighing not more than three pounds per thousand: Provided, that such stamps shall be in denominations of ten, twenty, fifty, and one hundred, and the laws and regulations governing the packing and removal for sale of cigarettes, and the affixing and cancelling of the stamps on the packages thereof, shall apply to cigars weighing not more than three pounds per thousand.

"'None of the packages of smoking tobacco and fine-cut chewing tobacco and cigarettes prescribed by law shall be permitted to have packed in, or attached to, or connected with, them, any article or thing whatsoever, other than the manufacturers' wrappers and labels, the internal-revenue stamp and the tobacco or cigarettes, respectively, put up therein, on which tax is required to be paid under the internal-revenue laws; nor shall there be affixed thereto, or branded, stamped, marked, written, or printed upon, said packages, or

8 their contents, any promise or offer of, or any order or certificate for, any gift, prize, premium, payment or reward.'

"These provisions went into effect on this date and will be im-

mediately enforced. The rate of tax accrues on cigars and cigarettes removed for consumption or sale on and after July 24, the date the act was approved.

"This act makes a new definition of cigars and cigarettes. Cigarettes which have been called 'all-tobacco cigarettes' are now designated as cigars.

"The tax on cigarettes weighing not more than three pounds per thousand is double the old rate.

"Manufacturers will not be allowed to remove from the factory cigarettes which are not properly stamped under the new law.

"Proper stamps are being prepared and will be furnished collectors upon requisition.

"All packages of smoking tobacco, fine-cut chewing tobacco, or cigarettes, containing articles prohibited as above, or having such articles attached or connected therewith, or advertising any promise or offer of gift, premium, reward or prize, contrary to the provision above set forth, are subject to seizure, if found to have been removed from the factory and put upon the market after this date.

"Collectors will immediately notify all manufacturers of cigars and tobacco of the provisions of the law above recited as far as they are affected thereby.

"W. S. FORMAN,
"*Commissioner.*"

Approved:
"L. J. GAGE, *Secretary.*"

On the 2nd day of August in the year 1897, the said Commissioner Forman issued another circular of which the following is a copy:

9 "*Modification of Department Circular No. 106, Internal Revenue No. 477.*

"1897.

"Department circular No. 115, internal revenue No. 479.

"TREASURY DEPARTMENT,
"OFFICE OF THE COMMISSIONER OF INTERNAL REVENUE,
"WASHINGTON, D. C., *August* 2, 1897.

"Department circular No. 106, internal revenue No. 477, is hereby revised and modified as follows:

"All of the paragraph commencing on page one and reading as follows:

"'All packages of smoking tobacco, fine-cut chewing tobacco, or cigarettes, containing articles prohibited as above, or having such articles attached or connected therewith or advertising any promise or offer of gift, premium, reward or prize, contrary to the provision above set forth, are subject to seizure, if found to have been removed from the factory and put upon the market after this date,' is hereby revoked and the following substituted:

"All violations of the last paragraph of section 10 of the act of July 24, 1897, with reference to packing foreign matter inside of statutory packages, and marking or printing offers of reward as inducements for sale, etc., upon the outside, will be referred to this office for instructions.

"The right of this office to make seizures for violations of the paragraph referred to having been questioned, seizures will not be made unless ordered by this office.

"W. S. FORMAN,
"*Commissioner.*"

"Approved:
"L. J. GAGE, *Secretary.*"

In the month of October, in the year 1897, the said Commissioner Forman made his annual report to the Secretary of the Treas-
10 ury, which by the Secretary of the Treasury was in due course transmitted to Congress in December of that year, in which report the said Commissioner used the following language:

"The last paragraph of section 10 of the act of July 24, 1897, above quoted, prohibits packages of smoking tobacco, fine-cut chewing tobacco, and cigarettes from having packed in, or attached to, or connected with them, any article or thing whatsoever of a foreign nature, and provides that there shall not be affixed to or branded, stamped, marked, written or printed upon said packages, or their contents, any promise or offer, or any order or certificate for, any gift, prize, premium, payment or reward.

"These provisions apply to cigars weighing not more than three pounds per thousand, as they are made by the same section subject to the law governing the packing and removal for sale of cigarettes.

"Whether by accident or design, packages of plug tobacco, snuff, and cigars weighing more than three pounds per thousand are not included.

"As these provisions were inserted in the bill while in conference and without having passed either house, this office has not the benefit of the discussions in Congress which usually accompany measures proposed and enacted and throw light upon the object and purpose of the law.

"Manufacturers have been notified of these provisions, and while there has been manifested in general a disposition to comply with the law, many complaints have been made as to its arbitrary features and doubts raised as to its constitutionality.

"It will be observed that there is no penalty provided for its violation, and if there is any penalty it must be found in some other law previously passed. The removal of tobacco which is not put up in 'proper packages' is a punishable offense under section 3374 Revised Statutes. The law also provides the penalty of forfeiture for
11 removing tobacco otherwise than is provided by law. (Section 3372, R. S.)

"It is doubtful if the courts would hold that the penalties provided by these sections are applicable, and the same may be said of section 3456, Revised Statutes, which is intended to cover by general pro-

vision those instances where acts have been enjoined or forbidden by the statute and no specific penalty elsewhere imposed.

"As far as the protection of the revenue is concerned, this office does not regard such stringent provisions necessary. They cause annoyance to a large class of taxpayers without furnishing additional security to the Government in the matter of preventing fraud.

"I would recommend that the law be amended so as to authorize the Commissioner to prescribe by regulations what statutory packages of tobacco, snuff, cigars, and cigarettes may contain, or authorize him to prohibit the packing in such statutory packages of articles which increase appreciably the size or weight of the package under penalty of seizure and forfeiture."

In the year 1898 while similar legislation was pending before Congress, Honorable N. B. Scott, then Commissioner of Internal Revenue, wrote a letter to the chairman of Ways and Means Committee of the House of Representatives of the United States in the following words:

"SIR: Referring to my visit on the 22nd inst., in regard to legislation amending section 10 of the act of July 24, 1897, I have the honor to herewith inclose draft of bill which, it is believed, will accomplish what is desired by the Internal Revenue Bureau, for the more practical enforcement of the law."

The draft of the bill which was inclosed with the last-mentioned letter was in the following words:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That the last paragraph of section 10 of the act of July 24, 1897, be and the same is hereby amended so as to read as follows:

"'That the statutory packages containing tobacco, snuff,
12 cigars or cigarettes, in which is packed or to which is attached any article or thing whatsoever (except such as, by reason of not noticeably or appreciably increasing the size or weight of the package, is permitted by regulation or instruction duly promulgated by the Commissioner of Internal Revenue) shall be subject to seizure and forfeiture.'"

On the 17th day of May in the year 1898, the said Commissioner Scott addressed a letter to the chairman of the Finance Committee of the Senate of the United States with respect to a bill then pending before Congress in which letter the following language was used:

"Inclosed please find a copy of the bill as amended by your committee and reported by you on the 12th inst. with proposed changes effected by erasures and interlineations indicating additional amendments which in the opinion of this office should be made. Nearly all of the proposed amendments are of an administrative character. Under the head of tobacco, cigars, cigarettes and snuff, page 7, line 11, after the word 'ounces' an amendment is suggested authorizing the inclosure in the packages of tobacco of certain labels, advertisements or vouchers, not of a pictorial nature, as shall not appreciably increase the size or weight thereof. This office under existing law does not permit such labels, &c., to be inserted, but sees no reason why manufacturers of tobacco shall be deprived of this method of

advertising, provided the practice is limited in the manner indicated so that there will be no loss of revenue resulting therefrom."

On the 20th day of May in the year 1898 the said Commissioner Scott wrote to the same member of the Senate committee a letter containing the following language:

"In compliance with your request for an amendment authorizing the enclosure of labels, advertisements and vouchers, not of a pictorial nature, in packages of tobacco authorized by the bill, providing that the weight of the enclosed labels, advertisements and vouchers shall be included in the weight of the tobacco and taxed as tobacco, and providing also for levying a tax on
13 stock on hand which shall be equal to one-half the increase in tax, it is suggested that the objects desired may be accomplished by inserting after word 'ounces' on line 11, page 7, and before the word 'and' where it first occurs, on line 19, page 10, the following:

"and in addition to the tobacco inclosed or packed therein, there may be enclosed or packed in the packages of tobacco now or hereafter permitted by law, such labels, advertisements, or vouchers not of a pictorial nature as shall not appreciably increase the size thereof or weigh more than a pound to each one thousand of such labels, advertisements or vouchers, subject moreover, to such regulation as the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury may prescribe. Provided further, that in determining the weight of these packages for purposes of taxation, the weight of the inclosed labels, advertisements and vouchers shall be included."

On the 6th day of August in the year 1898, the said Commissioner Scott sent to the Secretary of the Treasury of the United States a communication in the following words and figures:

"WASHINGTON, D. C., *August* 6, 1898.

"To the honorable Secretary of the Treasury.

"DEAR SIR: I submit for your consideration the following:

"By the tariff act of July 24, 1897, it was provided: None of the packages of smoking tobacco and fine-cut chewing tobacco and cigarettes prescribed by law shall be permitted to have packed in or attached to or connected with them, any article or thing whatsoever, other than the manufacturers' wrappers and labels, the internal-revenue stamp and the tobacco or cigarettes respectively, etc.

"In August, 1897, in a department circular, issued by my predecessor with your approval, it was stated that the powers and duties of this bureau under the act quoted had been called in question; and collectors were therefore directed to make no seizures, but to report to the bureau any violations of the act.

14 "Complaints have been received that certain manufacturers still continue a practice theretofore expressly permitted by this bureau of enclosing in packages of tobacco printed matter, advertisements or vouchers, sometimes called 'coupons,' which do not appreciably increase the size or weight of the package or embar-

rass the assessment or collection of revenue, and are not pictorial nor in aid of lottery schemes.

"This practice has continued openly, without concealment and under claim of right, and up to this time no prosecutions have been instituted either by my predecessor or myself.

"In November last my predecessor, Commissioner Forman, in his report transmitted by you to Congress, called attention to this act, expressed doubts whether it could be enforced by suit, and stated that the exclusion of such printed matter from tobacco packages was not necessary for any revenue purpose, and that it would cause annoyance to a large class of taxpayers.

"Since I have myself occupied the office of Commissioner I have not found that the exclusion of such matter as that in question would furnish additional security to the Government or help to prevent fraud, or that its inclusion in any way embarrassed either the assessment or collection of the revenues. Such being the case in March last, upon my recommendation a bill was introduced which definitely permitted the inclusion of such matter, under proper regulations and provided for enforcing the exclusion of bulkier articles.

"Congress recently adjourned with this bill still pending.

"Some of the manufacturers who have followed the practice above mentioned have prepared and tendered for my use a circular in the form hereto annexed entitled 'Proposed circular,' with the desire of having the question submitted to the Attorney General for his opinion, and for that purpose such other action as you may deem best to take is respectfully submitted with the request that I be advised of the conclusion reached.

15 "I find in the law no specific instruction for either seizure or prosecution. No revenue interest would be involved either in any ruling which I might make upon this point or in any test case which might be instituted. Any prosecution will doubtless be strenuously resisted and serious legal questions will be raised.

"I respectfully beg to be advised what course should be adopted. If a test case is determined upon, I will proceed with that according to the methods established by the precedents of the department.

"Yours respectfully, N. B. SCOTT,

"*Commissioner.*"

The circular which is referred to in the last-mentioned letter of the said Commissioner Scott to the Secretary of the Treasury, was in the following words and figures:

"*Proposed Circular.*

"The history of the bureau shows that in the year 1891 and for a considerable while before that year the assessment and collection of internal-revenue taxes had been embarrassed by the introduction into packages of tobacco of other articles such as pocket-knives, photographs and other things. Thereupon the bureau issued the following regulation:

"*Circular No.* 371.

"Marks and contents of packages of tobacco.

"TREASURY DEPARTMENT,
"OFFICE OF INTERNAL REVENUE,
"WASHINGTON, *November* 4, 1891.

"To the collectors of internal revenue:

"Manufacturers of tobacco, in marking the gross, tare and net weight of packages of tobacco, should include in the gross the full weight of the package and all its contents. The tare should include the weight of the pail, lining, covering, etc., so that the tare subtracted from the gross will give the net weight of the tobacco contained therein and expressed by the stamp. Great care should be exercised by collectors to prevent foreign articles of any
16 kind being included in the packages. A practice has grown up, which seems to be on the increase, by which manufacturers have included in statutory packages many foreign articles. This practice should be discontinued. A package of tobacco means a package containing tobacco and nothing else.

"You will please notify the manufacturers in your district of the necessities hereafter for a full compliance with the terms of this circular.

"JOHN W. MASON,
"*Commissioner.*

"Soon after the issuing of this circular a question arose whether the regulation applied to many things in themselves unobjectionable which had commonly been included with the tobacco. Manufacturers who had not been in the habit of placing in their packages pocket-knives, photographs or other similar things, had habitually placed in the packages advertisements of various kinds and in some instances vouchers such as are commonly known as coupons. The question having been raised it was promptly decided by the Commissioner who issued this regulation, that circular No. 371 was not intended to apply to such things as did not materially increase the size or weight of the package.

"From that time to the present the settled practice of the bureau has been in accordance with that decision. The rule has worn well and the business of the department has been satisfactorily carried on under it. The shapes and sizes of the packages have given no cover for fraud and have been such that claims could not be made for an allowance from the weight of the package on the ground that non-taxable articles were included in it. On the other hand both the manufacturers and the public have still been permitted to obtain the advantages which could be permitted to them without interfering with the work of the department. Vouchers or coupons of inappreciable weight were included in the packages which entitled the purchaser to receive from the manufacturer specified articles.

17 "The practice thus adopted offered no place for lotteries or schemes of chance nor for objectionable pictures. At the same time inasmuch as the weight and size of the vouchers or advertisements rather than the matter printed upon them, were made the criterion of their lawfulness, it was perhaps possible to cover under the ruling of the department papers, cards or advertisements connected with lotteries or schemes of chance or hazard. In order that no doubt might be left of the intention of the law emphatically to prohibit any such schemes, the Congress of the United States included in the act of 1897 the following provision:

"'None of the packages of smoking tobacco and fine-cut chewing tobacco and cigarettes prescribed by law shall be permitted to have packed in, or attached to, or connected with, them, any article or thing whatsoever, other than the manufacturers' wrappers and labels, with the internal-revenue stamp and the tobacco or cigarettes respectively, put up therein, on which tax is required to be paid under the internal-revenue laws; nor shall there be affixed to, or branded, stamped, marked, written or printed upon, said packages, or their contents, any promise or offer of, or any order or certificate for, any gift, prize, premium or reward.'

"When the previous history of the department and the state of the pre-existing law are considered, it can scarcely be doubted that the two evils at which this statute was pointed, were first, the suppression of lottery schemes, including schemes of chance or hazard; and secondly, the suppression of the circulation of objectionable pictures. These latter, while not specifically mentioned in the statute, are fairly within its prohibition. They are not inappreciable in weight. They are prized, if at all, for their own sake. They come fairly within the language and even more clearly within the manifest purpose of the statute.

"A careful consideration of this provision of the statute makes it clear therefore that the law was not intended to apply to such advertisements or vouchers as do not appreciably increase the
18 weight or size of the package and such as are free from the taint belonging to lottery schemes and schemes of chance or hazard. The law has been thus understood by the department as was manifested by the practice under it as well as by the report submitted by my predecessor on November 1st, 1897.

"While it is perhaps unnecessary that I should go beyond the matters which have already been adverted to, it may be of interest to note, as corroborating the conclusions at which I have arrived, that a number of the State courts have rendered decisions upon the same lines. These were in cases involving State legislation pointed at vouchers or coupons, and it will be found that the State courts have uniformly either decided that such legislation was unconstitutional or else have so construed the statutes as to permit these vouchers and coupons to be used. Long *v.* Maryland, 74 Md., 565; Commonwealth *v.* Emerson, 165 Mass., 146; People *v.* Gillson, 109 N. Y., 389. In the case last cited an exhaustive opinion was delivered by Mr. Justice Peckham, then a member of the New York court of appeals and now of the Supreme Court of the United States.

"In determining what shall be considered an inappreciable weight it is perhaps necessary to adopt some arbitrary rule and it seems to me to confine the vouchers or coupons to a weight not exceeding one one-thousandth of a pound will certainly accomplish all the desired results.

"Collectors are therefore instructed:

"That there will not be permitted to be packed in, attached to, or printed upon, any package of tobacco any article or thing, printed matter, impression or print of any sort whatever, other than manufacturers' labels, that—

"(*a*) Appreciably increases the size of the package, or weighs more than 1-1000 of a pound;

"(*b*) Advertises, mentions, or is in any way in aid of, or a factor of any lottery, or other scheme involving chance or hazard; or

"(*c*) Is of a pictorial nature, except manufacturers' trade-marks, labels, &c., now permitted on the outside of packages.

19 "Collectors will promptly report for instructions as to procedure all violations or supposed violations of this ruling, together with full statement in detail of the precise character of such violation or supposed violation."

After receiving the last-mentioned communication from the said Commissioner Scott, the Secretary of the Treasury submitted the same to the Attorney General of the United States with a request for an opinion upon the matters therein contained, and on the 19th day of August, in the year 1898, Honorable James E. Boyd, Assistant Attorney General of the United States, transmitted to the Secretary of the Treasury a communication approved by the Attorney General of the United States, and which was in the following words and figures:

"DEPARTMENT OF JUSTICE,
"WASHINGTON, D. C., *August 19th*, 1898.

"The honorable the Secretary of the Treasury.

"SIR: I have the honor to acknowledge receipt of your letter of the 9th instant asking to be advised whether the prohibition contained in section 10 of the tariff act of June 24, 1897, purporting to amend Revised Statutes, section 3394 as amended, can be enforced under Revised Statutes, section 3456, or under any other law relating to the subject. The prohibition in question is as follows:

"None of the packages of smoking tobacco and fine-cut chewing tobacco and cigarettes prescribed by law shall be permitted to have packed in, or attached to, or connected with, them any article or thing whatsoever, other than the manufacturers' wrappers and labels, the internal-revenue stamp and the tobacco or cigarettes, respectively, put up therein, on which tax is required to be paid under the internal-revenue laws; nor shall there be affixed to, or branded, stamped, marked, written, or printed upon, said packages, or their contents, any promise or offer of, or any order or certificate for, any gift, prize, premium, payment or reward. Section 3456 R. S., which is one of the provisions of the internal-revenue laws common
20 to several objects, omitting such of the said section as is not pertinent to the inquiry in hand, is as follows:

"If any * * * manufacturer of tobacco or cigars shall knowingly or wilfully omit, neglect, or refuse to do or cause to be done, any of the things required by law in the carrying on or conducting of his business, or shall do anything by this title prohibited, if there be no specific penalty or punishment imposed by any other section of this title for the neglecting, omitting or refusing to do, or for the doing or causing to be done the thing required or prohibited, he shall pay a penalty of one thousand dollars; and if the person so offending be * * * a manufacturer of tobacco or cigars, all tobacco or cigars found in his manufactory shall be forfeited to the United States.

"The first question which arises is as to whether this is a case in which the Attorney General is authorized by law to give an opinion. The question presented, in some respects, is not one arising in your department, but belongs more properly to this department and the courts of justice, and the inquiry whether a proceeding under section 3456, or under any other law, would or would not be successful is a judicial question on which it is not necessary or proper for me to give an official opinion. (20 Opin., 702.)

"However, I regard the matter as one of such importance that I do not think proper to dismiss it without making a suggestion that it be tested as early as practicable in the courts. This legislation undoubtedly involves several important legal questions which I think should be passed upon by the courts before an effort is made to put it into general execution.

"It is not apparent to me that this paragraph in any way affects the collection of taxes upon manufactured tobacco, and it is probable that Congress had another object in view in its enactment. The latter part of the paragraph quoted seems to indicate that the intention of the act was to exclude from packages of manufactured tobacco, cigars and cigarettes things which were, in the judgment of Congress, immoral, or in some other like way objectionable.

21 Now, Congress has the power, in connection with the manufacture and sale of tobacco, aside from the regulation of interstate commerce in that article, to provide for the collection of internal-revenue taxes therefrom; but this law is aimed at the sale, gift, or distribution, without any reference to interstate commerce, of articles accompanying packages of manufactured tobacco. There is at least plausible ground upon which to base the contention that such restriction of private rights is not authorized by the Constitution, The power to collect revenue from specific articles does not necessarily imply a power to regulate the business of citizens with regard to other subjects. It is a question which admits of much doubt, whether Congress when it enacts laws for the purpose of raising revenue from the business of manufacturing and selling tobacco, is warranted in enacting in connection therewith legislation to protect the morals of the people. It has been held by the Supreme Court of the United States in the case of U. S. *vs.* E. C. Knight Company, 156 U. S., 1, that these matters belong exclusively to the States.

"Aside from this, the paragraph quoted presents some difficulties

in the way of the effectual enforcement of its provisions by seizures, fines, or the like. Penal statutes, according to the fundamental principles, should clearly prescribe the offence and its punishment and point out the offender; so that a man may not be condemned for an act which he reasonably supposes himself at liberty to commit with impunity.

"I would suggest, therefore, that the Commissioner of Internal Revenue cause to be instituted through some one of the collectors a proceeding by which the validity and scope of this law can be tested in the courts. A seizure of packages containing the prohibited articles can be made and a criminal warrant issued against some
22 manufacturer or other person who is alleged to have violated the provisions of the paragraph, and thus a case can be brought before the courts and the questions involved judicially determined.

"Respectfully,

JAMES E. BOYD,
"*Assistant Attorney General.*

"Approved:
"JOHN W. GRIGGS,
"*Attorney General.*"

It is further agreed that the Internal Revenue Bureau does not hold it to be essential to an honest and full collection of the tax upon manufactured tobacco, to prohibit the introduction into statutory packages of coupons, used purely for advertising purposes, immaterial in weight, and size and it is further agreed that for a considerable time before the institution of the present case, there had been frequent complaints made to the Government by private persons or corporations who were interested in the discontinuance by the defendant and others of the use of the said coupons. These complaints were to the effect that the said coupons were within the prohibition of the statute, that the law with respect to them was not being enforced and that it ought to be enforced. It was because of such complaints that the above-entitled case was instituted and is being prosecuted, and also because of the insistence by private persons or corporations who were interested in the continuance, by the defendant and others, of the use of the said coupons. And it is agreed that the suit was understood to be a friendly one to settle controversies between the rival interests by judicial decision, and in accordance with the suggestions made by the Department of Justice that the Commissioner of Internal Revenue should cause to be instituted a "proceeding by which the validity and scope of the law can be tested in the courts." The right is reserved to either party to object at the hearing to the relevancy of anything contained in this statement.

23 It is further certified that upon these facts the district court entered a judgment forfeiting to the Government the five cases of tobacco of 288 packages each and directed them to be sold by the marshal.

Whereupon the cause was taken on error to the circuit court of appeals for the fourth circuit, and having come on for argument at

the November term, in the year 1900, of the said circuit court of appeals for the fourth circuit before the undersigned, and the said circuit court of appeals desiring, in order to the proper decision of the cause, the instructions of the Supreme Court of the United States concerning certain questions or propositions of law arising in said cause:

Now, therefore, we, the undersigned, do hereby certify the said questions or propositions of law to the Supreme Court of the United States for instruction as aforesaid:

First. Whether the third clause of the tenth section of the act of Congress of July 24, 1897, if the prohibition of that statute be applied to the coupons described in the foregoing statement of facts, was in accordance with or in conflict with the Constitution of the United States.

Second. Whether, if the said section be properly construed, the coupons described in the foregoing statement of facts are within its prohibition.

Third. Upon the facts stated, was the seizure set forth in the information of the packages of Merry World tobacco therein
24 described, or was the judgment of forfeiture rendered in this case justified under section 3453 of the Revised Statutes?

Fourth. Upon the facts stated, was the seizure set forth in the information of the packages of Merry World tobacco therein described or was the judgment of forfeiture rendered in this case justified under section 3456 of the Revised Statutes?

Witness our hands this 27th day of November, in the year 1900.

NATHAN GOFF,
Senior Circuit Judge.
CHARLES H. SIMONTON,
Circuit Judge.
THOS. R. PURNELL,
District Judge.

I, Henry T. Meloney, clerk of the United States circuit court of appeals for the fourth circuit, do certify that the foregoing is a true copy of the original certificate of the questions of law certified to the Supreme Court of the United States, filed and now remaining of record in the therein-entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the U. S. circuit court of appeals for the fourth circuit, at Richmond, this 3d day of December, in the year of our Lord nineteen hundred.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, 4th Ct.

Endorsed on cover: (Certificate.) File No., 17,984. U. S. C. C. of appeals, 4th circuit. Term No., 499. Emanuel Felsenheld, claimant of 288 packages of Merry World tobacco, plaintiff in error, *vs.* The United States. Filed December 6th, 1900.

BRIEF ON BEHALF OF APPELLANT.

Filed Nov. 25, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 205

MANUEL FELSENHELD, CLAIMANT OF 288 PACKAGES OF MERRY WIDOW TOBACCO,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

IN A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

JOHN DE WITT WARNER,

Of Counsel with Plaintiff in Error

20 Broadway, New York City.

Brooklyn Daily Eagle Job Printing Dept., New York.

Supreme Court of United States.

EMANUEL FELSENHELD, Claimant of 288 packages of "Merry World" Tobacco,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

Brief for Plaintiff in Error, by John De Witt Warner, of Counsel.

Statement of the Case.

The facts in this case have been agreed upon (see Printed Certificate, p. 2).

At pages and folios of the Printed Certificate below respectively indicated, the following facts appear:

September 23, 1898, at Wheeling, West Virginia, Internal Revenue Collector White seized certain packages of "Merry World" tobacco (p. 2, fol. 2).

When seized there was in each such package a small slip of paper, called a "coupon," printed on both sides, which "coupon" had been placed in the package at the time it was packed in the manufactory before sale. These "coupons" were all alike. Each "coupon" had printed on one side of it:

"Merry World" Tobacco.
"Coupon."

"With the tobacco packed herewith the "purchaser has bought a definite share in

"any of the articles mentioned on the other
"side of this voucher," &c., &c.,

and on the other side, a list of the "articles" referred to, from which,—on terms definitely stated and not involving any lottery, chance or uncertainty—every purchaser had equal right to select (p. 2, fol. 3).

This voucher or "coupon" was printed on thin paper of inappreciable weight, of no intrinsic value in itself, had upon it no picture of any kind, and neither affected in any way the ascertainment of the tax payable upon the package, nor interfered with its collection (p. 3, fol. 5).

October 17, 1898, the United States, by its attorney, filed its information against the tobacco so seized, in the District Court of United States for the District of West Virginia, asking that it be declared forfeited, and setting forth two counts.

One count alleged that at the time of said seizure the said packages and each of them had packed in, attached to and connected with them a certain article other than the manufacturer's wrappers and labels, the internal revenue stamp and the tobacco; that is to say, a small slip of paper, called a coupon, which was the voucher or "coupon" above mentioned, and which was fully described in this count of the information (p. 1, fol. 1).

The second count of the information alleged that each of the said packages had affixed to, branded, stamped, marked and printed thereupon and upon its contents certain promises and offers of and orders and certificates for certain gifts, prizes, premiums, payments and rewards. That is to say, the information charges as a second count the printing upon the paper of such vouchers or coupons, the statement and list of articles above set forth (p. 1, fol. 2).

Said tobacco when seized was owned by Emanuel Felsenheld (p. 3, fol. 5), and on the same day that the information was filed he intervened, claiming to be the owner, insisting that seizure was not jus-

tified by law, and asking leave to defend, which he was permitted to do. A jury being waived, the case was tried before the District Judge, and the District Court entered judgment forfeiting to the Government the packages of tobacco in question.

Whereupon the cause was taken on error to the Circuit Court of Appeals for the Fourth Circuit, and, having come on for argument, such Circuit Court, desiring the instruction of the Supreme Court of the United States in the premises, certified to this Court questions or propositions of law for instruction, viz. (Printed Certif., p. 16):

First.—Whether the third clause of the tenth section of the Act of Congress of July 24, 1897, if the prohibition of that statute be applied to the coupons described in the foregoing statement of facts was in accordance with or in conflict with the Constitution of the United States.

Second.—Whether, if the said section be properly construed, the coupons described in the foregoing statement of facts are within its prohibition.

Third.—Upon the facts stated, was the seizure set forth in the information of the packages of "Merry World" tobacco therein dercribed, or was the judgment of forfeiture rendered in this case justified under Section 3453 of the Revised Statutes?

Fourth.—Upon the facts stated, was the seizure set forth in the information of the packages of "Merry World" tobacco therein described, or was the judgment of forfeiture rendered in this case justified under Section 3456 of the Revised Statutes?

POINTS.

As to the first question certified:

> "*Whether the third clause of the tenth section of the Act of Congress of July 24, 1897,*

" *if the prohibition of that statute be applied*
" *to the coupons described in the foregoing*
" *statement of facts, was in accordance with*
" *or in conflict with the Constitution of the*
" *United States.*"

Such third clause reads as follows:

" None of the packages of smoking tobacco
" and fine-cut chewing tobacco and cigarettes
" prescribed by law shall be permitted to have
" packed in, or attached to, or connected with
" them in any article or thing whatsoever,
" other than the manfacturer's wrappers and
" labels, the internal revenue stamp and the
" tobacco or cigarettes, respectively, put up
" therein, on which tax is required to be paid
" under the internal revenue laws; nor shall
" there be affixed thereto, or branded,
" stamped, marked, written, or printed upon
" said packages, or their contents, any
" promise or offer of, or any order or certifi-
" cate for, any gift, prize, premium, payment
" or reward " (Printed Cert., p. 5, fols. 7-8).

I.

As already noted, the information herein makes each portion of the clause in question the subject of a separate count. For convenience the latter portion will be first discussed.

FIRST POINT.

In so far as the statute here in question prohibits the affixing, branding stamping, marking or printing " upon said packages or their contents of any promise or offer of or any order or certificate for any gift, prize, pre-

mium, payment or reward," such statute, if so construed as to prohibit the use of the vouchers or coupons in question, is in conflict with the Constitution of the United States, and void.

(*a.*) *This legislation is not an exercise of any express power of Congress.*

This is admitted and assumed by all parties. No argument is needed to show that to prescribe what shall not be printed, &c., upon tobacco packages or their contents, is not a matter as to which Congress is given express power.

(*b.*) *The implied power of Congress can be used only in aid of some express power.*

This is a fundamental principle which will not be questioned.

(*c.*) *To be constitutional, any statute, depending upon implied powers of Congress, must be a necessary or appropriate means towards the exercise of some express power.*

Any right of Congress to enact it is concededly only under that clause of the United States Constitution which empowers Congress

> " to make all laws which shall be necessary
> " and proper for carrying into execution the
> " foregoing powers and all other powers
> " vested by this Constitution in the Govern-
> " ment of the United States or in any depart-
> " ment or officer thereof."

The test as to the constitutionality in such cases is tersely put by Story (Book 3, Sec. 1242):

> " When, therefore, a question arises con-
> " cerning the constitutionality of a particular
> " power, the first question is whether the
> " power be expressed in the Constitution,

"* * * if it be not expressed, the next "inquiry must be whether it is properly an "incident to an expressed power and neces- "sary to its execution. If it be, then it may "be exercised by Congress. If not, Con- "gress cannot exercise it."

And in *McCulloch* vs. *Maryland*, 4 Wheaton, 423 (1819), the Court summarily described the means which may be employed under an implied power as those "*which are plainly adapted to the end*" (of an expressed power).

It will not be claimed that the Constitution expressly gives Congress the power to legislate as to the manufacture of or dealing in tobacco within a State.

It is, however, empowered to levy and collect taxes, therefore (to paraphrase Story's words): If the power to forbid the inclusion of mere vouchers such as this is properly an incident to the power to levy and collect Internal Revenue, and necessary to such levy and collection, then Congress may exclude them. If not, Congress cannot do so.

McCulloch vs. *Maryland*, 4 Wheaton, 423 (1819):

"Let the end be legitimate; let it be within "the scope of the Constitution; and all "means which are appropriate, *which are* "*plainly adapted to that end*, which are not "prohibited but consistent with the letter "and spirit of the Constitution are constitu- "tional" (above expressly quoted and approved in Hepburn *vs.* Griswold, 8 Wall., 603 (1870)).

License Tax Cases, 5 Wall., 462–470 (1867):

"No interference by Congress with the "business of citizens transacted within a "State is warranted by the Constitution, "except such as is *strictly incidental* to the "exercise of powers clearly granted to the "Legislature" (cited with approval in Covington *vs.* Kentucky, 154 U. S., 204 (1894)).

Matter of Jackson, 96 U. S., 727-8 (1878):

"*To give efficiency to its regulations and* "*prevent rival postal systems* it (Congress) "may, perhaps, prevent the carriage by "others for hire over postal routes of arti- "cles which legitimately constitute mail "matter * * * *but further than this its* "*power of prohibition cannot extend.*"

(*d.*) *It is the prerogative and duty of the Federal courts to inquire whether a statute, defended under the implied powers of Congress, is in fact necessary or appropriate to the exercise of some express power, and decide according as it finds the case to be.*

Our Federal Government being one of granted and limited powers, not including police powers in the State, the propriety and necessity for this rule is even more obvious than in the case of a statute of a State; but even where the unquestioned police power of the State was urged as a pretext for statutes attacked on the ground of unconstitutionality, Federal as well as State courts have uniformly ruled it the duty of the Court to exercise its judgment as to the necessity or appropriateness of the statute to the end proposed.

Matter of Jacobs, 98 N. Y., 98 (1885). (Frequently cited with approval by Federal courts):

PECKHAM, *J.:*

(110) "* * * Under the mere guise of "police regulations, personal rights and pri- "vate property cannot be arbitrarily invaded, "and the determination of the Legislature is "not final or conclusive. *If it passes an act* "*ostensibly for the public health, and thereby* "*destroys or takes away the property of a* "*citizen, or interferes with his personal* "*liberty, then it is for the courts to scrutinize* "*the act and see whether it really relates to* "*and is convenient and appropriate to pro-*

" *mote the public health. It matters not that*
" *the Legislature may in the title to the act,*
" *or in its body, declare that it is intended for*
" *the improvement of the public health. Such*
" *a declaration does not conclude the courts,*
" *and they must yet determine the facts de-*
" *clared, and enforce the supreme law.* * * *"

(111.) "* * * The general government
" is one of limited powers particularly speci-
" fied in the Federal Constitution. But in
" addition to the powers granted it is provided
" in the Constitution that Congress shall have
" power 'to make all laws which shall be
" necessary and proper for carrying into exe-
" cution the foregoing powers.' Under this
" provision Congress is not the final judge of
" what is 'necessary and proper,' but its laws
" must have a legitimate and in view, must
" be within the scope of the Constitution,
" must be appropriate and plainly adapted to
" that end, and not prohibited by, but con-
" sistent with, the letter and spirit of the Con-
" stitution; *and whether the laws passed un-*
" *der the implied powers contained in the sec-*
" *tion cited are of the character mentioned*
" *and thus justified, is always open to judicial*
" *inquiry* (McCulloch *vs.* Maryland, 4
" Wheaton, 316, 421; Hepburn *vs.* Griswold,
" 8 Wall., 603; Legal Tender Cases, 12 *Id.*,
" 437; 110 U. S., 421). * * * A law en-
" acted in the exercise of the police power
" must, in fact, be a police law. If it be a
" law for the promotion of the public health,
" it mus be a health law, having some rela-
" tion to the public health."

That is to say, if a law purports to be a tax law, it must be of such nature as to facilitate assessment or collection of taxes or prevent frauds upon the revenue.

Ex parte, 98 Cal., 73 (1893):

" * * * *As the right of the citizen to en-*
" *gage in or choose a business or follow such*
" *a profession is protected by the Constitu-*
" *tion, it is always a judicial question whether*
" *any particular regulation of such right is a*
" *valid exercise of legislative power*" (Cases cited).

Re Marshall, 102 Fed. Rep., 323 (May 16, 1900):

An ordinance of Marin County, California, forbade any person in the County of Marin to use any repeating shotgun for the purpose of killing quail, &c.

Marshall was convicted in State court of having killed a quail with a repeating shotgun.

Question was as to constitutionality under Fourteenth Amendment, U. S. Constitution, providing that no State shall "deprive any person of life, liberty or property, without due process of law."

> Court (325) "* * * In the present instance, *what was the end sought? Manifestly, only the prevention of the taking or killing by any one person of more than 25 quail, partridge, or grouse in any one day.* * * *
> "* * * *That end is just as effectively accomplished without the obnoxious section as with it.* It is wholly immaterial to that object whether the sportsman or hunter uses a repeating or magazine gun, or a double or single barreled gun * * * and the opportunity of detection is just as great in one case as in the other. *No valid reason is therefore perceived, and none has been suggested by counsel why the owner of a repeating or magazine shotgun should be prohibited from using it.* * * * The equal protection of the laws to which every person is by the provisions of the Constitution of the United States above quoted, declared entitled, would indeed be a vain thing if such discriminatory legislation was sustained by the Courts." * * * (Cases cited) And quotes and cites *re* Jacobs, 98 N. Y., 98, quoted *supra*.

(e.) *The taxing power is the only express power suggested here as that in aid of which this statute can be defended.*

This is not merely obvious from the record, but assumed by all parties, and argument would be superfluous.

(*f.*) *The Constitution gives Congress no right to exercise police power in the States.*

License Tax Cases, 72 U. S., 497 (1867):

(500.) "Very different considerations apply "to the internal commerce or domestic trade "of the States. Over this commerce and trade "Congress has no power or regulation nor "any direct control. This power belongs "exclusively to the States. No interference "by Congress with the business of citizens "transacted within a State is warranted by "the Constitution, except such as is strictly "incidental to the exercise of powers clearly "granted."

United States vs. *DeWitt*, 9 Wall., 41 (1870):

"As a police regulation, relating exclusively "to the internal trade of the States, it (14 Stat. "at Large, 484, prohibiting sale of naphtha, "&c., of certain inflammability) can only have "effect where the legislative authority of "Congress excludes, territorially, all State "legislation, as, for example, in the District "of Columbia. Within State limits, it can "have no constitutional operation."

(*g.*) *This statute is not in aid of the taxing power, or of any revenue interests, but in attempted exercise by Congress of police power in the States, in conflict with the Constitution, and void.*

This is superfluously clear from the fact—that the prohibition is not of all printing upon such packages, or their contents, or of printing on any specific portion thereof, or of printing in certain sizes or styles of type or colors or ink—any of which (though in this case agreed not to be the fact) some one might imagine as affecting revenue interests—but only of printed matter having the purport specially set forth. That is to say, matter printed is permitted in the same size and style of type, with the

same colored ink, covering to the same extent such packages and their contents, and identical, so far as concerns every conceivable effect on the assessment or collection of revenue, with that thus forbidden—provided only the permitted printing does not violate the literary taste or the moral prejudice of those who do not approve of the promises or offers in question.

It is too plain to permit argument that the intent of such a statute is not to aid the collection of taxes, but, in attempted exercise of a police power, to prohibit methods of business or advertising, of which Congress disapproved—a matter entirely beyond its constitutional powers.

See *U. S.* vs. *De Witt*, 9 Wall., 41 (1870).

Discussing the claim of possible effect upon the revenue of the statute there in question, to the effect that no one should sell oil at less than 110 degrees test, the Court said, in words directly in point upon the case here:

> " *This consequence* (upon revenue) *is too* " *remote and too uncertain* to warrant us in " saying that the prohibition is an appropri- " ate and plainly adapted means for carrying " into execution the power of laying and col- " lecting taxes." * * * *Standing by itself it is plainly a regulation of police.*
>
> " * * * As a police regulation relating " exclusively to the internal trade of the " States, it can only have effect where the " legislative authority of Congress excludes " territorially all State legislation, as for ex- " ample in District of Columbia."

The statute on its face is plainly not in aid of the levy or collection of Internal Revenue taxes. It was, indeed, the privilege of the Government to have adduced proof—had there been such—of circumstances such as should justify the statute on this ground. It has not merely failed to do so, but, as above noted, has stipulated the fact to be otherwise.

As the Attorney-General says:

> " *It is not apparent to me that this para-*
> " *graph in any way affects the collection of*
> " *taxes upon manufactured tobacco, and it is*
> " *probable that Congress had another object*
> " *in view in its enactment.* The latter part
> " of the paragraph quoted seems to indicate
> " that the intention of the act was to exclude
> " from packages of manufactured tobacco,
> " cigars and cigarettes, things which were,
> " in the judgment of Congress, immoral, or
> " in some other like way, objectionable "
> (Printed Certif., p. 14, fols. 20–21).

II.

The remaining count of the information here alleged that, at time of the seizure herein, each of the packages of tobacco seized had "packed in, attached to and connected with it, a certain article other than the manufacturer's wrappers and labels, the Internal Revenue stamp and the tobacco"—that is to say, a small slip of paper called a coupon.

SECOND POINT.

In so far as the statute here in question prohibits the packing in, or attaching to, or connecting with the tobacco packages in question any article or thing whatsoever other than the wrappers and labels, revenue stamp and tobaccos or cigarettes; Such statutes, if so construed as to prohibit the use of the vouchers or coupons in question, is in conflict with the Constitution of the United States and void.

As already noted, *supra*, in considering the other portion of the clause in question, as a whole, and

applying to it the same argument and the same authorities as that already noted under first point with reference to the portion of the clause there in question, we have:

"This legislation is not an exercise of any express power of Congress."

"The implied power of Congress can be used only in aid of some express power."

"To be constitutional, any statute, depending upon the implied powers of Congress, must be a necessary or appropriate means towards the exercise of some express power."

"It is the prerogative and duty of the Federal courts to inquire whether a statute, defended under the implied powers of Congress, is in fact necessary or appropriate to the exercise of some express power, and decide according as it finds the case to be."

"The taxing power is the only express power suggested here as that in aid of which this statute can be defended."

"This statute is not in aid of the taxing power, and is, therefore, in conflict with the Constitution and void."

As to this not merely does the Government offer no proof whatever that a provision, on its face immaterial to the levy or collection of taxes, is in reality of any interest to it in that connection; but by the statement of fact, agreed to by both parties as the proof in this case, it is conclusively shown that the exclusion of such vouchers as the "coupons" here is not necessary (in either the more strict or more liberal use of that term) either to aid Government in levying or collecting taxes, or to prevent or discourage fraud against the Government in this regard, or in any other respect (Printed Certif., p. 15, fols. 22-23).

There neither is nor can be any exception by either side as to the competency of all matter included in the agreed statement of fact.

To be sure, the Government might have offered proof to controvert the conclusions to be drawn therefrom. But not having done so, the proof admitted upon the record becomes conclusive against the Government upon this point.

Moreover, in itself this agreed statement is of the greatest possible weight, drawn, as it is, from the files of the Government itself; consisting, as it does, of the statements of its own officials; including, as it does, the opinion of those whose competency as experts on this point is unassailable—the successive Commissioners of Internal Revenue, the Assistant Attorney-General and the Attorney-General of the United States.

Referring to the very provisions of Section 10, under which the information here is brought, Commissioner Forman officially reported to the Secretary of the Treasury in October, 1897, as follows:

> "As far as the protection of the revenue is
> "concerned, this office does not regard such
> "stringent provisions necessary. They cause
> "annoyance to a large class of taxpayers
> "*without furnishing additional security to*
> "*the Government in the matter of preventing*
> "*fraud*" (Printed Certif., p. 8, fols. 11–12).

May 17, 1898, Commissioner Scott, the successor in office of Commissioner Forman, officially advised the Finance Committee of the United States Senate:

> "*This office* * * * *sees no reason why*
> "*the manufacturers of tobacco shall be de-*
> "*prived of this method of advertising* (*by*
> "*thus using* '*coupons*'), provided the practice
> "is limited in the manner indicated" (to such labels, advertisements or vouchers not of a pictorial nature as shall not appreciably increase the size or weight thereof) (Printed Certif., p. 8, fols. 12–13).

In an official letter to the Secretary of the Treasury, August 6, 1898, Commissioner Scott says:

> "* * * *I have not found that the ex-*
> "*clusion of such matter as that in question*"

(printed matter, advertisements or vouchers, sometimes called 'coupons,' which do not appreciably increase the size or weight of the package) "*would furnish additional security* "*to the Government or help to prevent fraud,* "*or that its inclusion in any way embarrassed* "*either the assessment or collection of the* "*revenues*" (Printed Certif., p. 10, fols. 14–15).

And also:

"I find in the law no specific instruction "for either seizure or prosecution. *No rev-* "*enue interest would be involved either in* "*any ruling which I might make upon this* "*point or in any test case which might be in-* "*stituted*" (Printed Cert., p. 10, fol. 15).

And finally by the stipulation under which this case is submitted, it is agreed that:

"The said coupon is printed on thin paper, "*is of inappreciable weight*, is *without any* "*intrinsic value* in itself, and *has upon it no* "*picture of any kind*, and *does not affect in* "*any way the ascertaining of the proper tax* "payable upon the package *or interference in* "*any way with the collection of such tax*" (Printed Certificate, p. 3, fols. 5 and 6).

Also:

"It is further agreed that *the Internal Rev-* "*enue Bureau does not hold it to be essential* "*to an honest and full collection of the tax* "*on manufactured tobacco*, to prohibit the "introduction into statutory packages of "coupons, used purely for advertising pur- "poses, immaterial in weight and size" (Printed Certificate, p. 15, fol. 23).

Upon a point thus conclusively established and clearly outlined extended argument would be superfluous.

For, directly against the constitutionality of the statute here, are:

United States vs. *De Witt*, 9 Wall., 41 (1870).

In construing statute that no one should sell oil at less than 110 degrees test, the Court said:

> "*But this express grant of power* to regu-
> "late commerce among the States *has al-*
> "*ways been understood as limited by its*
> "*terms; and as virtual denial of any*
> "*power to interfere with the internal trade*
> "*and business of the separate States; ex-*
> "*cept, indeed, as a necessary and proper*
> "*means for carrying into execution some*
> "*other power expressly granted or vested.*"
> * * *
>
> "And we have been referred to provisions
> "supposed to be analogous: * * * *but the*
> "*analogy appears to fail at the essential*
> "*point, for the regulations referred to in*
> "*cases cited are restricted to the very articles*
> "*which are the subject of taxation, and are*
> "*plainly adapted to secure the collection of*
> "*the tax imposed,*"

and discussing claim of possible effect upon the revenue of the statute there is question, in respect of which the implied power was claimed, the Court says, in words directly in point in our case,

> "*This consequence* (upon revenue) *is too*
> "*remote and too uncertain* to warrant us in
> "saying that the prohibition is an appropriate
> "and plainly adapted means for carrying into
> "execution the power of laying and collect-
> "ing taxes.
> "* * * *Standing by itself it is plainly a*
> "*regulation of police.*"

We do not forget the ingenious suggestion repeatedly made of *possible* Government interests which might *possibly* be subserved by the statute under consideration here. To them all the conclusive answer is:

It is not to the stimulated imagination of the Government's counsel, but to common sense, that the Court will look in construing the statute, and judging as to its intent, scope and effect."

The statute on its face is plainly not in aid of the levy or collection of Internal Revenue taxes. It was, indeed, the privilege of the Government to have adduced proof—had there been such—of such circumstances as should justify the statute on this ground. It has not surely failed to do so; but, as above noted, has stipulated the fact to be otherwise.

The claimant is not called upon to prove a negative; but, from the testimony of the Government officers themselves, he has actually done so. The stipulation entered into by all parties here expressly admits that the act in question has revenue use, either in aiding to levy or collect taxes or in preventing fraud; and that it is so utterly without bearing upon these points that no Government interests whatever is or can be involved by any ruling or decision as to its construction or validity, while the Attorney-General and his assistant—most unimpeachable of all experts as to the construction of the law (and by the agreed statement of fact admitted to speak) - say:

> "*It is not apparent to me that this paragraph in any way affects the collection of taxes upon manufactured tobacco.* * * * Now Congress has the power, in connection with the manufacture and sale of tobacco, aside from the regulation of Interstate commerce in that article, to provide for the collection of internal revenue taxes therefrom; but this law is aimed at the sale, gift or distribution, without any reference to Interstate commerce, of articles accompanying packages of manufactured tobacco (Printed Certif., p. 14, fols. 20–21);

and concludes with the most pertinent, albeit conservative, statement:

> "There is at least plausible ground upon which to base the contention that *such restriction of private rights is not authorized by the Constitution*" (Printed Certif., p. 14, fols. 21–22).

THIRD POINT.

If the Tenth Section of the Act of Congress of July 24, 1897, be properly construed, the "coupons" or vouchers here are not within its prohibition.

The only prohibition involved is that in the third clause of the section in question, viz.:

> (1) "None of the packages of smoking tobacco and finely cut chewing tobacco and cigarettes prescribed by law shall be permitted to have packed in, or attached to, or connected with them, any article or thing whatsoever other than the manufacturers' wrappers and labels, the internal revenue stamp and the tobacco or cigarettes, respectively, put up therein, on which tax is required to be paid under the internal revenue laws;" and
>
> (2) "Nor shall there be affixed thereto, or branded, stamped, marked, written, or printed upon said packages, or their contents, any promise or offer of, or any order or certificate for, any gift, prize, premium, payment or reward" (Printed Certif., p. 5, fols. 7-8).

(*a.*) *The literal meaning of a statute will be disregarded if necessary, in order so to construe it as to be constitutional.*

> *Cooley on Constitutional Limitations* (Ann. Ed., p. 218):
>
> The duty of a court to uphold a statute when the conflict between it and the Constitution is not clear, and the implication that must always exist that no violation has been intended by the Legislature may require it in some cases, where the meaning of the Constitution is not in doubt, to lean in favor of such a construction of the statute as might not at first view seem most obvious. For, as

a conflict between the Constitution and the statute is not to be implied, it would seem to follow, where the meaning of the Constitution is clear, that the Court, if possible, must give the statute such a construction as will enable it to have effect.

United States vs. *Central R. R.*, 118 U. S., 235 (1886):

" Where two constructions are contended " for of the statute, the one should be adopted " by the Court which makes it conform to the " Constitution."

United States vs. *132 Packages*, 76 Fed. Rep., 364 (1896):

" When a statute is susceptible of two con- " structions, one which would render it valid " and operative, and the other to press it " against the constitutional competency of " Congress to enact, or render it inoperative, " the former construction will be adopted."

State Brown vs. *Union*, 62 N. J. Law, 142 (1899):

Holds that one of two possible constructions of the legislative act which will uphold, rather than one which will invalidate it, will be adopted.

Hartman vs. *Weltmayer*, 8 Pa. Dist. Rep., 223 (1899):

Holds that a statute will be so construed, if possible, as to avoid the conclusion that it is unconstitutional.

Singer Manufacturing Co. vs. *McCollock*, 24 Fed. Rep., 667 (C. C., E. D. Ark., 1884):

" * * * When an act of the Legislature " admits of two interpretations, one of " which brings it within, and the other " presses it beyond their constitutional au- " thority, the courts will adopt the former " construction. In the construction of stat-

" utes, the rules of grammar are less import-
" ant than the intention of the Legislature.
" And the sense and spirit of the statute pre-
" vails over the strict grammatical construc-
" tion of its words, 'for the letter killeth but
" ' the spirit giveth life.' "

(*b.*) *Moreover, a statute will be so construed as to be rational, and, within the construction adopted in practice by administrative officers, even against its literal reading.*

Of the numerous cases which might be cited in support of this point, below a few of the latest are noted:

Reiche vs. *Smythe*, 13 Wall., 162 (1872):

" If it be true that it is the duty of the Court
" to ascertain the meaning of the Legislature
" from the words used in statute and the sub-
" ject matter to which it relates, *there is an*
" *equal duty to restrict the general meaning of*
" *words*, whenever it is found necessary
" to do so in order to carry out the legislative
" intention."

Platt vs. *Union Pacific R. R. Co.*, 99 U. S. Rep., 48 (1879):

" All will concede that in construing the
" act of 1863, *we are to look at the state of*
" *things existing, and in the light then ap-*
" *pearing seek for the purposes and objects of*
" *Congress in using the language it did.* And
" we are to give such construction to that lan-
" guage, if possible, as will carry out the con-
" gressional intention."

Houston, &c., R. R. Co., vs. *The State*, 39 S. W., 390 (1899):

Holds that the long continued construction adopted and acted upon by the State's executive officers charged with the execution of a statute, is in the highest degree persuasive on the courts on the construction of such

statute where there is doubt of its meaning and application.

(*Maxwell* vs. *Dow*, 176 U. S., 581 (44 L. Ed. (1900):

The language of a constitutional amendment should be read in connection with the new condition of affairs out of which the occasion for its adoption may have arisen and then construed * * * so far as it is reasonably possible to forward the known purpose or object.

United States vs. *Mrs. Gue Lim*, 176 U. S., 459 (1900):

" The question here arising in regard to the " correctness of the decision of the District " Court in the case of the married woman, de- " pends for its solution upon the construction " to be given by the sixth section of the Act " of Congress of 1884. * * *

" Sec. 6. *That* * * * *every Chinese per- " son other than a laborer*, who may be en- " titled by said treaty and by this Act to come " within the United States, and who shall be " about to come to the United States, *shall " obtain the permission of and be identified " as so entitled by the Chinese Government " * * * in each case to be witnessed by a " certificate issued by such Government.* " * * *

(464.) " *The question is, What did Congress " mean by the Act of 1884?*

(465.) " It is plain that in this case the " woman could not obtain the certificate as " a member of those specially enumerated " classes (permitted to enter U. S.). She is " neither an official, a teacher, a student, a " merchant, nor a traveler for curiosity or " pleasure. She is simply the wife of a mer- " chant, who is himself a member of one of " the classes in the treaty and entitled to ad- " mission. * * *

" *Does the sixth section mean that in such a " case the wife must obtain the certificate " therein provided for? We think not.*

(467.) "Nothing is better settled," says the present Chief Justice in Lau Ou Bew *vs.* U. S., 144 U. S., 47-49, "than that statutes "should receive a sensible construction, such "as will effectuate the legislative intentions, "and, if possible, so as to avoid an unjust "conclusion.

"The purpose of the sixth section requir- "ing the certificate was not to prevent the "persons named from coming into the "country, but to prevent Chinese laborers "from entering under the guise of being one "of the classes permitted by the treaty. It "is the coming of Chinese laborers that "the act is amed against. * * * It was "also held in that case (144 U. S., 47-49), that "*although the literal meaning of the statute* "*of 1884, Section 6, would require a certifi-* "*cate* in the case of a merchant already domi- "ciled in the United States, and who had left "the country for temporary purposes *animo* "*revertendi, yet its true and proper construc-* "*tion did not include his case, and the general* "*terms used in the act were limited to those* "*persons to whom Congress manifestly in-* "*tended to apply them.*"

Rohstrat vs. *People*, 185 Ill., 133 (1900):

"The constitutional right of every citizen "to choose his occupation, includes the right "to advertise it in a legitimate way."

Man vs. *Buchanan*, 52 S. W., 505 (Tenn., 1899):

"A statute which imposes restrictions upon "trade or common occupations, or which "levies an excise tax upon them must be "strictly construed."

(c) *The coupon in question is not an article or thing within the intent of the act.*

Here, inquiry into the status when the act was passed leaves no reasonable doubt as to the aim and interpretation of the statute in question.

From the agreed statement of fact (Printed Cert., p. 4, fols. 5-6) we find that formerly:

> " * * * a practice was followed by some " manufacturers of packing in their packages " of tobacco other articles *having some intrin-* " *sic value* such as *penknives, pictures and* " *other things.*"

And that on November 4, 1891, Honorable John W. Mason, then Commissioner of Internal Revenue, issued to Collectors of Internal Revenue a circular (371) advising them upon this point:

> " * * * Great care should be exercised " by Collectors to prevent foreign *articles* of " any kind being included in the packages. A " practice has grown up, which seems to be " on the increase, by which manufacturers " have included in statutory packages many " foreign *articles.* This practice should be " discontinued " (Printed Cert., p. 11, fols. 16-17).

Soon after the issuing of this circular the question arose whether the regulation applied to mere advertising, vouchers, &c., which did not appreciably increase the size or weight of a package as distinguished from the article or thing itself referred to by such advertisement or voucher.

As to this, after receipt of repeated inquiries, Commissioner Mason ruled:

> " *The object of circular 371 was to prevent* " *the packing in statutory packages of tobacco* " *various kinds of merchandise.* It was *not* " the intention of this office to interfere in any " way with any legitimate advertising, or " to prevent the introduction of small adver- " tising slips or cards, or anything of that " kind which does not increase appreciably " the size or weight of a package " (Letter, Mason, Commissioner of Internal Revenue, to Albert Scott, Collector, December 21, 1891).

The practice of the Department was thus settled, and, as stated by the Agreed case here:

> "The practice of packing similar 'coupons' "in similar packages of tobacco manufactured "and packed for sale and of selling such pack- "ages throughout the country has been fol- "lowed by a number of different manufac- "turers for ten or more years" (Printed Cert., p. 3, fols. 5-6).

Also:

> "* * * * certain manufacturers" (including claimant) "still continue a practice "theretofore" (that is, prior to the Act of July 24, 1897, and under Commissioner Mason's ruling) "*expressly permitted* by "this Bureau of enclosing in packages of "tobacco printed matter, advertisements or "vouchers, sometimes called 'coupons,' "which did not appreciably increase the size "or weight of the package or embarrass the "assessment or collection of revenue, and "are not pictorial nor in aid of lottery "schemes.
>
> "This practice" (in question here) "has "continued openly without concealment "and under claim of right" (Printed Cert., p. 9, fols. 14-15).

For many years the packing in the packages of tobacco of *articles or things* of "intrinsic value," as Commissioner Scott puts it, or "merchandise," as Commissioner Mason put it, proved objectionable, and was therefore forbidden by Department regulation. But the inclusion of mere advertising matter such as the "coupons" here, which did not appreciably increase the size or weight of the package *was not found objectionable*, and was *expressly permitted*, the word "articles" used in Circular No. 371, being interpreted by the Bureau itself to mean only articles of "merchandise" or something else that appreciably increased the size or weight of the package.

Thus construed, the statute here would be simply the enactment into law of the regulation thus approved by experience; and the words "article" or "thing" would mean some article of merchandise, or thing of intrinsic value in itself—as distinguished from a mere advertisement or voucher for such article or thing to be procured at some other place.

So construed also, the statute would prevent only practices which, in actual experience, had been found objectionable, and thus construed might be necessary or proper in aid of the taxing power of Congress. But so to construe the "article" or "thing" thus used, as to include within it not merely substantial articles or things of intrinsic value, but also mere advertisements of or vouchers therefor, promotes no Government interest, is inconsistent alike with the practice and ruling of the Department, which for many years had been acted upon by the public generally, and not in aid of any taxing or other express power of Congress.

This view is supported by the remaining sentence of said third clause:

> "nor shall there be affixed thereto, or "branded, stamped, marked, written, or "printed upon said packages, or their con- "tents, any promise or offer of, or any order "or certificate for, any gift, prize, premium, "payment or reward" (Printed Cert., p. 5, fols. 7–8).

This clearly contemplates that the said packages will or may have "*contents*," upon which promises, orders or certificates can be branded, stamped, marked, written or printed, and by inference *permits* this, *provided* such offer, &c., is not of any gift, prize, premium, payment or reward.

As already noted, the prohibition (being in attempted exercise of police powers) is void, but its wording is, none the less, conclusive as to the intent of the whole clause, and the meaning of the words

"articles or thing" whatsoever in the previous sentence.

Either (1) such internal revenue stamp and the manufacturers' wrappers or labels *are contemplated* as packed loose, inside the package, as to be properly termed its contents; or (2) the words "article or thing" do not include everything outside of manufacturers' wrappers and labels, the internal revenue stamp and the tobacco and cigarettes (which are expressly excepted from the prohibition); and it is contemplated that there are other "contents" upon which matter might be "branded, stamped, marked, written or printed."

If (1) be the case, then we have an arbitrary distinction, for unimaginable reasons, obviously not connected with any revenue interest, by which Congress arbitrarily permits detached wrappers, labels or stamps to be included in the package as "con tents," but arbitrarily forbids to be thus included the "vouchers" or "coupons" in question—though from any revenue, far less objectionable (if objectionable at all)—which legislation would be, if possible even more clearly unconstitutional than the attempt on the part of Congress to exercise police powers in the States.

For, to exclude a small piece of paper of inappreciable weight, which affects neither the size nor the shape of the package, while permitting manufacturers' wrappers and labels, internal revenue stamps, &c., to be enclosed, would be as unreasonable and absurd as it would be an arbitrary and illegal interference with the liberty of the citizen to transact his own business in his own way.

This leaves the other alternative as evidently the fact here, viz., that after prohibiting the packing in or attachment to or connection with tobacco packages of the "*articles* or *things*" that the draftsman had in mind, he still contemplated that they might contain just such matter as the slip of paper here in question, upon which matter might be, and proceeded to prohibit the printing of *certain* matter,

thus clearly inferring that other printing upon such contents was permitted, and, even more unqualifiedly, that there might be "contents" of such packages upon which there might be stamping, writing, marking or printing.

(*b.*) *The voucher or "coupon" here in question contains no offer or promise of or certificates for any prize, premium, gift, payment or reward.*

As will be seen on reading the coupon in evidence here (Printed Cert., p. 2, fols. 3-5) the claimant here has simply included with the price of tobacco sold by him a *definite* fraction of the *fixed* price of other *stated articles*, from which the purchaser may select —the purchaser of each package receiving therewith the so-called "coupon" as a voucher for the purchase other than that of tobacco which he has thus made.

As the Attorney-General advised the Secretary of the Treasury in this very case (Printed Cert., p 14, fols. 20-21) the paragraph quoted indicated that the intent of the act was to exclude from packages of tobacco things which, in the judgment of Congress, were "immoral or in some other like way objectionable."

That is to say—especially when the wording of our postal regulation prohibiting use of the mails for lottery purposes is recalled—what Congress had in view were lotteries, that is the distribution in some form of property by chance. To describe the methods and factors of these the group of words used, "gift, prize, premium, payment or reward," is appropriate. Not merely must each of these words be construed in view of accompanying words in the statute under consideration, and the group, as such, in view of the use of similar groups of words with reference to chance schemes, and hence not applying to the vouchers here; but taking each word by itself, the voucher for the delivery of a definite article, already bought and paid for, is as far as may

be from an offer of or order or certificate for a *gift*, a *prize*, a *payment*, a *premium*, or a *reward*.

This question is not a new one. It has been thoroughly threshed out in the courts of our principal States; and, after considering the question from every standpoint, the decisions have settled precedent on two points. *First*, that the business in which the vouchers, here called coupons, are used, is radically different from lottery or chance schemes, is unobjectionable, and is entitled to the protection of the courts. *Second*, that any attempt, even by a State Legislature exercising full police power, to prohibit such business is unconstitutional, an interference with the liberty of the citizen, and a taking of his property without compensation—obstruction to the disposal of property being held to come within the constitutional prohibition of "taking."

The leading case is *People* vs. *Gillson*, 109 N. Y., 389 (1888):

> "A person engaged as a retailer of coffee "might very well think that he could very "greatly enlarge the amount of his trade "by doing precisely what was done by the "defendant in this case. * * * This stat- "ute, if valid, steps in to prevent his adopt- "ing such a course. * * * He is thus re- "strained in the free enjoyment of his fac- "ulties. * * * The proof in this case "shows there was no lottery or pre- "tense of lottery in the transaction "upon which the defendant was con- "victed of a violation of the act. There "was not the slightest element of chance in "the case. * * * To call such a transac- "tion a lottery, or the check" (corresponding to the coupon here) "given with the coffee "a sale of lottery tickets, is to wholly ignore "the true nature and character of a lottery, "and also of this transaction. *In this scheme "the purchaser not only gets what he pays "for, but by the very terms of the contract he "has no chance of obtaining anything more.* "* * * Nor can this act stand as a valid "exercise of legislative power to enact what

" shall amount to a crime. The power of the " Legislature to so declare is exceedingly " large, and it is difficult to define its exact " limit. But that there is a limit even to " that power under our Constitution we en- " tertain no doubt, and we think that limit " has been reached and passed in the act " under review. The power has been unlaw- " fully exercised in this instance, for the same " reasons that we have already stated, be- " cause it violates the constitutional pro- " vision which secures to each person in this " State his liberty and property, except as he " shall be deprived of one or both by due " process of law."

This was followed by

Commonwealth v. *Morehead*, VII. C. C. Pa., 513 (1890):

(514) The Act in question was entitled " An Act for the Suppression of Lottery Gifts by Stockholders and Others to Secure Patron age."

After reciting, in its preamble that the laws against gambling and lotteries are evaded by the holding of tickets entitling the holders thereof to money or articles of value as inducements to purchasers to the injury of legal business, the statute (Act of 1885) enacts that—

" Any merchant, manufacturer, importer, " retailer or dealer doing business within this " commonwealth, who shall offer, give or " sell, or authorize or permit any agent, sales- " man or employee to offer, give or sell, any " purchaser or customer any ticket or tickets, " check or checks, or other token or memo- " randa, entitling such person or customer to " demand or receive money or any article of " value, shall be deemed guilty of a misde- " meanor.

(517) " A mere chance to draw a prize " * * *, a ticket which may bring the " holder a prize worth one cent, or one worth " a hundred dollars or nothing, is one thing. " A memoranda or check entitling him to re- " ceive money or another article of little

"value to be selected by himself is a very
"different kind of thing.

(519) "And it is not within the power of the
"Legislature to make that a fact which is not
"a fact (Edw. App., 108 Pa., 283-90). No
"more can it make that a lottery which is
"not a lottery. The act, therefore, must be
"held void."

* * * * * *

In the course of its opinion the Court also discussed the question whether the tickets prohibited by the act involved any question of chance, and ruled that they did not.

Long vs. *Maryland*, 74 Md., 565 (1891):

Here, by Maryland Act of 1886, the Legislature had made it a misdemeanor, in selling merchandise of any description in packages or bulk, to hold out as an inducement any "gift enterprise of any kind "or character whatsoever."

Long, convicted of misdemeanor under this Act, appealed to the Court of Appeals of Maryland on the stated question—

"Whether the act referred to is a valid ex
"ercise of legislative power."

The Court reversed the conviction, saying in its opinion:

"Insofar as the object of an act is to pro-
"tect the morals and advance the welfare of
"the people by prohibiting every scheme and
"device bearing any semblance to lottery or
"gambling, it undoubtedly would be a valid
"exercise of power. * * *

"But the act in question goes farther, and
"in effect, as we construe it, declares, as did the
"New York statute, which was held invalid
"in the case referred to (People *vs.* Gillson),
"that no person shall give away anything to
"a purchaser of goods, wares or merchandise,
"as an inducement to make the purchase.
"* * *

"It follows that the Act of 1886, Ch. 480, "by reason of its general terms, including, "as it does, all gift enterprises, those involv- "ing the element of chance, as well as those "which do not, is invalid so far as it relates "to gift enterprises not involving chance, "and that the judgment of the Criminal "Court of Baltimore must be reversed."

Commonwealth vs. *Emerson*, 165 Mass., 446 (1896):

Conviction here reversed upon opinion of Court as follows:

"This is a complaint for a penalty under "St. 1884, C. 277. The evidence was that the "defendant, a retail dealer in tobacco, dis- "played in his shop a large number of photo- "graphs of distinguished or notorious men "and women, with an advertisement that "each purchaser of a piece of a certain "tobacco was entitled to one of these photo- "graphs. Upon each piece of tobacco was a "label to such effect, and the defendant told "the witness that each purchaser was en- "titled to a photograph and to make his own "selection. * * *

"We are of the opinion that the statute "ought not to be construed to apply to a "case such as this. * * *

"The sale prohibited is a sale upon any "representation 'that anything other than "what is specifically stated to be the subject "of the sale' is to be delivered, &c. We "must give these words a reasonable mean- "ing. They were not intended and do not "purport to forbid a sale of two things at "once, even if one of them is the principal "object of desire and the other additional in- "ducement which turns the scale.

"If that had been the object it would have "been simpler and hardly more sweeping to "have forbidden altogether the sale of more "than one thing at a time. But the aim of "this statute is to prevent offers of bargains "which appeal to the gambling instinct, and "induce people to buy what they do not want "by the promise of a gift or prize, the precise "nature of which is not known at the mo-

" ment of making the purchase. There was
" nothing of that sort in the present case.
" All that was sold ' was specifically stated to
" ' be the subject of the sale,' and we think
" it very plain that, if the offer of a single
" photograph with the tobacco would have
" been lawful the offer of a choice out of a
" number is no less so."

Then followed:

Ex parte McKenna, 126 Cal., 429 (1899).

The City of Fresno had imposed an annual license tax upon merchants transacting a business in which the issue and redemption of "stamps," redeemable in money or merchandise was a feature.

The point here discussed was as to whether the business was objectionable, and therefore properly restricted by high license, or whether it was legitimate, and hence should not be discriminated against by excessive taxation. The Court having decided that the high rate imposed indicated an intent to restrict, thus proceeded:

" The complaint upon which the prisoner
" was arrested means nothing more than
" this; that in conducting the business of a
" merchant, he makes a practice of issuing
" stamps, or tickets, which he agrees to re-
" deem, and does redeem, in merchandise or
" money. * * *

" In support of the ordinance it is contended
" that the trading stamp device is a lottery in
" disguise, and therefore immoral. But we
" cannot see that it has any resemblance to a
" lottery. There is in it no element of
" chance, and nothing in the nature of gain.
" It appears to be simply a device to attract
" customers, or to induce those who have
" bought once to buy again, and in this re-
" spect is as innocent as any form of adver-
" tising. And besides, if it were a lottery in
" disguise—a mere device to cloak a gambling
" scheme—it would be unlawful, and not the
" subject of a license. The ordinance, there-
" fore, cannot be upheld on this ground. It
" is not an ordinance to prohibit an immoral

" practice or to regulate a hazardous or offen-
" sive business, or to conduct a lawful game or
" public exhibition. It is, under the guise of
" a revenue measure, an evident attempt to
" put an end to the issue and redemption of
" trading stamps by levying a discriminating
" and prohibitory tax upon those dealers who
" resort to that method of attracting cus-
" tomers." * * *

These were followed by decision in:

State vs. *Dalton*, 46 Atl. Rep., 234 R. I. Sup. Ct. (1900).

" The warrant had charged that with force
" and arms, Benjamin Dalton, of Johnston,
" did sell to one Frederick W. Perkins cer-
" tain articles of merchandise, to wit: Three
" pieces of tobacco, and did then and there give
" and distribute to said Frederick W. Perkins
" three stamps * * * which said stamps
" did then and there entitle the said Frederick
" W. Perkins to demand and receive certain
" articles of merchandise from Sperry &
" Hutchinson, at their store, said Sperry &
" Hutchinson being persons other than the
" vendor of said three pieces of tobacoo. * * *
" We come, then, to the question whether
" the act before us is one which falls within
" the police power of the Legislature; for if it
" is not, it is clearly an unlawful interference
" with private right."

Holding that the act cannot be considered appropriately in aid of public health or public safety, Court continues:

" The counsel in behalf of the State vig-
" orously contends that it does on the ground
" that it prohibits schemes which are in the
" nature of a lottery or gift enterprise, and
" hence, whether technically a lottery or not,
" are open to the same objection. * * *
" If this contention is well founded, the act
" in question is undoubtedly a valid and legi
" timate exercise of the police power. * * *
" The element of chance, which is the basal
" principle of every scheme in the nature of a

"lottery, is wholly wanting. To illustrate: "A buys of B twenty pounds of sugar for a "dollar, and is given with the purchase an "order, check, stamp, token, or some kind of "device—no matter what—which upon "presentation to C entitles A to some other "specific article of merchandise in addition "to the sugar. How does such a transaction "differ in principle from one where A re- "ceives the premium for making the pur- "chase—for such it really is—directly from "B himself?" * * *

Held that act is unconstitutional.

(e.) *The business represented by the voucher or "coupon" in question being one generally carried on throughout the country with the express approval not merely of the courts (see citations above), but by recent legislation in leading States, the presumption is against the intent of Congress to interfere with it, and the act will, if possible, be so construed as not to do so.*

This theory will be conceded. The facts are conclusively in favor of its application.

In addition to matters above noted the proof of business vogue and legislative approval is complete, and the brief reference now made is on the assumption that it is only necessary to call to the attention of the Court matters so generally known as, when recalled, to be of judicial cognizance.

The voucher or "coupon" method here in question is that of selling two articles at once, with the special aim thus to introduce or advertise one of them, and is an ordinary method of advertising and introducing (*a*) package groceries, and (*b*) weekly, &c., newspapers, depending on rural patronage. That is, with each package or subscription a voucher in some form is issued, entitling the purchaser, in addition to the coffee, tea, tobacco, or groceries, to receive such article or definite stated part of such article as he may select from a list furnished him at the time of his purchase or subscription.

The articles thus marketed in connection with the groceries are naturally selected with a view of pleasing those who would be best customers for such groceries, and are in fact of high average for utility and usefulness--Bibles, standard books, sterling and plated ware, razors, musical instruments, standard engravings, engraved certificates (wedding, of membership, &c.).

Furthermore, used as this method is by the leading manufacturers and publishers to whom it is important to protect their repute, they have in fact so carefully met expectations that in rural communities throughout the country these vouchers ("coupons" or "signatures") are prized as a means to secure thoroughly trustworthy articles.

In short, the system is based on the willingness of a manufacturer or publisher, in order to introduce or advertise his product, to buy for his patrons just these articles which can be bought at wholesale at greatest reduction from retail price, and which, in rural districts, are hardest to get of good quality at any reasonable price. And this method is being fast substituted for scenic and highway advertisements, in which such enormous expenditures have heretofore been made. The manufacturer or publisher finds this method so effective that he actually saves money, as compared with the amount he before spent in useless or offensive advertising; while, in the service thus received, the customer gets the benefit of whatever amount the manufacturer or publisher thus expends.

Two legitimate ends are thus attained at an expenditure less than that otherwise required for either, and it would be hard to find a better example of economy and enterprise than the business thus developed.

From phrases which appear on the record it is plain that counsel for Government confuses the business here in question, not merely with the lottery class (as to which see above), but with others which have been sometimes criticised. So radically mis-

taken is this that, *in fact, the voucher or coupon system here under discussion is universally popular, and is carefully protected by the several States, whenever legislation is had against the other methods with which the arguments of Government's counsel tends to confuse it.*

A brief memorandum will sufficiently establish this.

Within the last few years *Virginia, Maryland, Vermont, New Hampshire, Massachusetts, Arkansas, Tennessee, Rhode Island, New York and Louisiana* have enacted laws prohibiting or taxing what is known as the "Trading Stamp business." *In every case,* either by wording that definitely excludes them, by proviso excepting them from possible effect of such legislation, or by decision of the highest court of the particular State, the vouchers or coupons here under discussion have been approved and protected from attack (see instances in cases cited above).

Moreover, the advocates of trading stamps having usually attempted – in self-defense—to confuse them with the voucher system here in question, legislators have become more and more careful fully to describe and protect the latter, and more full and explicit in describing the business thus approved. For example: The latest installments of such laws are those of the current year (1900), being Chapter 768 of the Laws of New York, and Act No. 35 of the Legislature of Louisiana, for this year. The New York law provides:

> " It shall not be unlawful for any merchant
> " or manufacturer to place his own tickets,
> " coupons or other vouchers in or upon pack-
> " ages of goods manufactured by him. Such
> " tickets, coupons or other vouchers to be re-
> " deemed by such merchant or manufacturer
> " either in money or merchandise, whether
> " such packages are sold directly to the con-
> " sumer or through retail merchants. Nor
> " shall it be unlawful for any person to issue
> " with such packages tickets, coupons or

" other vouchers so issued by such merchant
" or manufacturer."

While the Louisiana law in question reads:

" It shall not be unlawful for any merchant
" or manufacturer to place his own tickets,
" coupons or other vouchers in or upon pack-
" ages of goods sold or manufactured by him.
" Such tickets, coupons or other vouchers
" to be redeemed by such merchant or manu-
" facturer either in money or merchandise,
" whethere such packages are sold directly to
" the consumer or through retail merchants,
" this exemption to apply also to newspapers.
" Nor shall it be unlawful for any person
" to issue with such packages, tickets, cou-
" pons, or other vouchers so issued by such
" merchant or manufacturer."

The Act of Congress here in question being on its face so clearly aimed at another and entirely different class of business, and the business here in question being so generally practiced and approved throughout the United States, and protected by the courts and legislatures of the several States, the purview of this act will be considered as limited to the object thus plainly indicated, and it will not be so strained by construction as to interfere with methods of business everywhere thus recognized as lawful.

It will, on the contrary, be presumed that, had Congress intended to prohibit the business now in question, it would have clearly so provided, and would have described it in apt words.

As already noted, *supra*, the clause in which the above quoted phrase occurs is so clearly a mere attempt on the part of Congress to exercise police powers in the States as to be hopelessly void in any case.

The attempt to apply this clause to the case here becomes even more hopeless, however, when it is noted that even if constitutional, it would not cover this case; for, as noted, no "prize, premium, gift, payment or reward" is in question here.

FOURTH POINT.

Section 3453 of the Revised Statutes did not in any manner justify either the seizure of packages of "Merry World" tobacco, set forth in the information, or the judgment of forfeiture rendered in this case.

Section 3453 in question reads:

> "Section 3453. All goods, wares, merchandise, articles or objects, on which taxes are imposed, which shall be found in the possession or custody, or within the control of any person, *for the purpose of being sold or removed by him in fraud of the internal revenue laws, or with design to avoid payment of said taxes*, may be seized by the collector or deputy collector of the proper district, or by such other collector or deputy collector, as may be specially authorized by the Commissioner of Internal Revenue for that purpose, and shall be forfeited to the United States. * * *"

This section applies exclusively to cases where the goods to be seized are found in possession or custody or control "for the purpose of being sold or removed by him *in fraud of the Internal Revenue laws, or with design to avoid payment of* "*taxes.*"

(*a.*) *In this case there is neither alleged nor shown either* (*1*) *any purpose of sale or removal; or* (*2*) *any fraud, attempt at fraud, or design of fraud upon the Internal Revenue laws; or* (*3*) *any design to avoid payment of taxes.*

Neither the information nor the agreed statement of fact, nor anything of record herein even suggests, much less alleges or shows, any purpose to sell or remove such tobacco for any purpose, or any fraud or attempt or contemplated fraud upon the Internal

Revenue laws, or design to avoid payment of taxes, or any other dereliction, legal or moral, connected with aught to which Section 3453 refers.

(*b.*) *The record here affirmatively shows that no fraud or design to avoid payment of taxes is here involved.*

As to the only statute—the third clause of the Tenth Section of the Act of Congress of July 24, 1897, of which, by either count of the information herein (Printed Cert., fols. 1 and 2), any violation is suggested, neither its purpose nor effect was to prevent any sale or removal of tobaccos, or any fraud upon the Internal Revenue laws, or any evasion of payment of taxes.

This is clear from the clause itself—which reads as follows:

> "None of the packages of smoking tobacco
> " and fine-cut chewing tobacco and cigarettes
> " prescribed by law shall be permitted to have
> " packed in, or attached to, or connected with
> " them any article or thing whatsoever, other
> " than the manufacturers' wrappers and
> " labels, the internal revenue stamp and the
> " tobacco or cigarettes, respectively, put up
> " therein, on which tax is required to be paid
> " under the internal revenue laws; nor shall
> " there be affixed thereto, or branded,
> " stamped, marked, written, or printed upon
> " said packages, or their contents, any promise
> " or offer of, or any order or certificate for,
> " any gift, prize, premium, payment or re-
> " ward" (Printed Cert., p. 5, fols. 7-8).

And the admission of the Internal Revenue Bureau itself, the following quotation being from the agreed facts of this case and (there being no evidence in rebuttal) conclusive against the Government.

Referring to the very provisions of Section 10 under which the information here is brought, Com-

missioner Forman officially reported to the Secretary of the Treasury, in October, 1897, as follows:

> "As far as the protection of the revenue is "concerned, this office does not regard such "stringent provisions necessary. They cause "annoyance to a large class of taxpayers, "*without furnishing additional security to* "*the Government in the matter of preventing* "*fraud*" (Printed Cert., p. 8, fols. 11–12).

May 17, 1898, Commissioner Scott, the successor in office of Commissioner Forman, officially advised the Finance Committee of the United States Senate:

> "*This office* * * * *sees no reason why* "*the manufacturers of tobacco shall be de-* "*prived of this method of advertising* (*by* "*thus using 'coupons'*), provided the prac- "tice is limited in the manner indicated" (to such labels, advertisements or vouchers not of a pictorial nature as shall not appreciably increase the size or weight thereof). (Printed Cert., p. 8, fols. 12–13).

In an official letter to the Secretary of the Treasury, August 6, 1898, Commissioner Scott says:

> "* * * *I have not found that the exclu-* "*sion of such matter* as that in question" (printed matter, advertisements or vouchers, sometimes called 'coupons' which do not appreciably increase the size or weight of the package) "*would furnish additional security* "*to the Government or help to prevent fraud,* "*or that its inclusion in any way embar-* "*rassed either the assessment or collection of* "*the revenues*" (Printed Cert., p. 10, fols. 14–15).

And also:

> "I find in the law no specific instruction "for either seizure or prosecution. *No reve-* "*nue interest would be involved either in* "*any ruling which I might make upon this* "*point or in any test case which might be in-* "*stituted*" (Printed Cert., p. 10, fol. 15).

And finally, by the stipulation under which this case is submitted, it is agreed that:

> "The said coupon is printed on thin paper, "*is of inappreciable weight*, is *without any* "*intrinsic value* in itself, and *has upon it no* "*picture of any kind*, and *does not affect in* "*any way the ascertaining of the proper tax* "payable upon the package, or interfere in "any way with the collection of such tax" (Printed Certificate, p. 3, fols. 5–6).

Also:

> "It is further agreed that *the Internal* "*Revenue Bureau does not hold it to be* "*essential to an honest and full collection of* "*the tax on manufactured tobacco* to pro- "hibit the introduction into statutory pack- "ages of coupons, used purely for advertising "purposes, immaterial in weight and size" (Printed Certificate, p. 15, fols. 23, &c.).

Upon a point thus conclusively established and clearly outlined, extended argument would be superfluous. Again, to use the words of the Attorney-General:

> "It is not apparent to me that this para- "graph in any way affects the collection of "taxes upon manufactured tobacco" * * * (Printed Cert., p. 14, fols. 20–21).

It would be superfluous to argue that a statute providing for seizure and forfeiture exclusively in cases where tobacco was held for purposes of sale and removal, in fraud of revenue and to evade taxation, could justify either seizure or forfeiture in a case where there is no allegation or proof of either.

And to suggest that even the seizure or forfeiture here can be justified under this section, becomes even more absurd if possible in the face, not merely of the utter lack of all basis therefor, but of the conclusive proof here of record that no fact existed which, even if alleged and proven, would have justified the application of Section 3453.

FIFTH POINT.

Section 3456 of the Revised Statutes did not in any manner justify either the seizure of packages of "Merry World" tobacco, set forth in the information, or the judgment of forfeiture rendered in this case.

> Sec. 3456. "If any distiller, rectifier, whole-
> "sale liquor dealer, or manufacturer of
> "tobacco or cigars, shall knowingly or will-
> "fully omit, neglect or refuse to do or cause
> "to be done any of the things required by
> "law in the carrying on or conducting of his
> "business, or shall do anything by this Title
> "prohibited, if there be no specific penalty
> "or punishment imposed by any other section
> "of this Title for the neglecting, omitting or
> "refusing to do, or for the doing or causing
> "to be done the thing required or prohibited,
> "he shall pay a penalty of one thousand dol-
> "lars; and if the person so offending be a dis-
> "tiller, rectifier or wholesale *liquor* dealer,
> "all distilled spirits or liquors owned by him
> "or in which he has any interest as owner,
> "and if he be a manufacturer of tobacco or
> "cigars, all tobacco or cigars found in his
> "manufactory shall be forfeited to the United
> "States."

(*a.*) *This section (3456) gives no authority whatever for seizure in any case.*

On comparing it with Section 3453, it is seen that the Internal Revenue Law itself sharply distinguishes (1) cases where, as under Section 3453, "*fraud of the Internal Revenue laws*" is involved (and the Commissioner of Internal Revenue therefore *specifically given power of seizure*); and (2), cases where, though the revenue interests are not affected, some other end of legislation is to be subserved. In cases coming under Section 3456, though

forfeiture is declared, neither the Commissioner of Internal Revenue nor the Treasury is given any power or duty in the premises; and the matter is left to be dealt with, if at all, by the law officers of the Government in their several districts, without imposing upon or permitting to revenue officers a task utterly unconnected with revenue.

In matters, therefore, arising under the amendment of Section 10 of the Act of July 24, 1897, here in question, *no fraud upon the revenue being involved, it is neither the right nor the duty of the revenue officials to make seizures or otherwise press prosecution.*

Not merely, therefore, was the seizure here not justified under Section 3456 of the Revised Statutes, but that section neither authorizes nor contemplates seizure in any case whatever.

(*b.*) *This section* (*3456*) *is no authority for forfeiture in this case.*

On citing the statute, so far as it applies to manufacturers of tobacco and cigars, we have—

> "If any * * * manufacturer of tobacco
> "or cigars shall knowingly or willfully * * *
> "do anything by this title prohibited, if there
> "be no specific penalty or punishment im-
> "posed by any other section of this title for
> "the * * * doing or causing to be done
> "the thing * * * prohibited, he shall
> "pay a penalty of one thousand dollars; and
> "*if the person so offending be* * * * *a*
> "*manufacturer of tobacco or cigars, all to-*
> "*bacco or cigars, found in his manufactory*
> "*shall be forfeited to the United States.*"

It is therefore plain that it is only, after *some person* has been shown to have violated the Internal Revenue Law, that, *if he be a manufacturer* of tobacco or cigars, then that all tobacco or cigars found *in the manufactory of such person* shall be forfeited, &c.

In the present case, neither by the information nor by any proof in the record is it suggested, much less found, that any person has thus offended, or that that person so offending is a manufacturer of tobacco or cigars, or that the tobacco seized was found in his manufactory.

In absolute default of all proof, or even suggestion in the premises, it would be superfluous to argue that upon the facts here stated, there is no possible ground for any claim that the judgment of forfeiture herein rendered was justified under section in question—3456 of the Revised Statutes.

To recapitulate.

Insofar as the statute here in question prohibits the affixing, branding, stamping, marking, or printing "upon said packages or their contents of any promise or offer of or any order or certificate for any gift, prize, premium, payment or reward," such statute, if so construed as to prohibit the use of the vouchers or coupons in question, is in conflict with the Constitution of the United States and void.

Insofar as the statute here in question prohibits the packing in, attaching to, or connecting with the tobacco packages in question any article or thing whatsoever other than the wrappers and labels, revenue stamp and tobaccos or cigarettes, such statutes, if so construed as to prohibit the use of the vouchers or coupons in question, is in conflict with the Constitution of the United States and void.

If the Tenth Section of the Act of Congress of July 24, 1897, be properly construed, the "coupons" or vouchers here are not within its prohibition.

Section 3453 of the Revised Statutes did not in any manner justify either the seizure of packages of "Merry World" tobacco, set forth in the information, or the judgment of forfeiture rendered in this case.

Section 3456 of the Revised Statutes did not in any manner justify either the seizure of packages of "Merry World" tobacco, set forth in the in-

formation, or the judgment of forfeiture rendered in this case.

It is, therefore, respectfully submitted, as to the questions or propositions of law herein certified that—

First: If the third clause of the Tenth Section of the Act of Congrees of July 24, 1897, be applicable to the vouchers or coupons described in the statement of facts herein certified, then such clause is in conflict with the Constitution of the United States;

Second: If said section be properly construed, the coupons described in such statement of facts are not within its prohibition;

Third: Upon the facts stated, neither the seizure set forth in the information of the packages of "Merry World" tobacco, therein described, nor the judgment of forfeiture rendered in this case was justified under Section 3453;

Fourth: Upon the facts stated, neither the seizure set forth in the information, of the packages of "Merry World" tobacco therein described, nor the judgment of forfeiture rendered in this case was justified under Section 3456,

and that the Circuit Court of Appeals for the Fourth Circuit should be accordingly instructed.

JOHN DEWITT WARNER,
Of Counsel with Plaintiff in Error.

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Office Supreme Court U.S.
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JAMES H. McKENNEY,
Clerk.

No. 205.

Br. of Russell for P. C.

Filed Dec. 5, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 205.

EMANUEL FELSENHELD, CLAIMANT OF 288 PACKAGES OF MERRY WORLD TOBACCO,
Plaintiff in Error,

v.

UNITED STATES.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

Supreme Court of the United States.

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v.

UNITED STATES.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

After this case had been argued before the Circuit Court of Appeals for the Fourth Circuit, the judges of that court certified the case to this court with four questions of law. As these questions involve the construction of Acts of Congress with respect to the facts, a statement of the case will be necessary in order to their intelligent understanding.

STATEMENT OF THE CASE.

This proceeding was brought by the Government in the interest and because of the insistence of private persons (Record 15) to test the validity of the claim which had been made that it was not lawful to include in legal packages of tobacco a particular kind of certificate, or coupon, as it is called.

This case was heard upon an agreed statement of facts, no

other evidence being introduced, (Record 2), and the nature of the coupon in question and its perfectly unobjectionable character, so far as the interests of the Government are concerned, are particularly set forth in the agreed statement.

The coupon is a small piece of paper, of inappreciable weight, having no intrinsic value, and having upon it no picture of any kind. (Record 3). It does not affect in any way the ascertaining of the proper tax payable upon the package of tobacco, or interfere in any way with the collection of the tax. (Record 3).

The coupon is included in the package, so that the purchaser obtains it with his tobacco. In has printed upon it the agreement of the manufacturer to give to the purchaser, in exchange for a definite number of coupons, any one of a number of valuable articles, a list of which is printed upon the coupon. These articles vary in value. The purchaser must present a greater number of coupons to obtain some articles than to obtain others. There is no element of chance or hazard in the transaction. Every package contains one of these coupons. Every purchaser obtains a coupon with his package. Every coupon represents a defined interest in any one of the articles named in the list. (Record 2, 3).

The agreed statement sets forth that the practice of packing similar coupons in similar packages of tobacco and of selling such packages throughout the country had been followed by a number of different manufacturers for ten or more years (Record 3, 4) During some portions of the same period a practice was followed by some manufacturers of packing other articles in their packages of tobacco. (Record 4). These other articles were wholly unlike the coupon. They had an intrinsic value of their own. They varied in weight, and size, and value. Their presence in the packages affected the weight of the packages, and incidentally affected the ascertainment of the quantity of tobacco contained in the packages. Because the weight of the packages and the quantity of tobacco contained in them were affected, the presence of these other articles may be said to have interfered with the Governmnt in the enforcement of the proper rules relating to the taxation of the tobacco.

The practice of including these articles in the packages also involved another element in which the Government was not properly interested. In some packages one of the articles in

question was inserted. In other packages a different article was inserted. Some packages were left without any of these foreign articles. There was therefore introduced into the transaction the element of chance or hazard. The purchaser of a package could not know, at the time of his purchase, whether his package contained anything in addition to the tobacco. If he were fortunate enough to happen upon a package containing some one of these foreign articles, yet he could not know at the time of his purchase whether the article in his package would prove to be the most valuable or the least valuable of the articles which it was the custom to include.

When congress came to legislate upon the subject, it manifestly had in mind the moral elements of the situation, rather than any matter belonging to the enforcement of the revenue laws. The element of chance which was involved in the purchase of the packages containing these foreign articles assimilated the transaction to the lottery or gift enterprise. Stepping outside of its legal province, congress, in the year 1897, included in the general revenue law a provision in these words:

"None of the packages of smoking tobacco or fine cut chew-
"ing tobacco and cigarettes prescribed by law shall be permit-
"ted to have packed in, or attached to, or connected with, them
"any article or thing whatsoever, other than the manufac
"turers' wrappers and labels, the internal revenue stamp and
"the tobacco or cigarettes, respectively, put up therein, on
"which tax is required to be paid under the internal revenue
"laws; nor shall there be affixed thereto, or branded, stamped,
"marked, written or printed upon, said packages or their con-
"tents, any promise or offer of, or any order or certificate for,
"any gift, prize, premium, payment or reward."

In the year 1898 the tobacco involved in the present proceeding was seized by the collector of internal revenue for the district of West Virginia. Thereupon an information was filed in the District Court. (Record 1). This information contained two counts. The first count alleged that at the time of the seizure each package had within it, in addition to the tobacco, a small slip of paper called a coupon, which is fully described in the information. The second count alleged that each package had affixed to the contents certain promises for prizes, these promises being set forth upon the coupon.

The present plaintiff in error intervened, claiming to be the owner of the tobacco and insisting that the seizure was not justified by law. The case was presented to the court upon an agreed statement, no other evidence being introduced. (Record 2). The District Court entered a judgment forfeiting the tobacco and directing it to be sold. (Record 15). The case was taken on error to the Circuit Court of Appeals for the Fourth Circuit, and upon the conclusion of the argument the judges of that court certified the questions which are now to be considered.

IF APPLIED TO THESE COUPONS THE ACT IS UNCONSTITUTIONAL.

In the information which was filed the Government undertook to rest its case upon each of the two branches of the statute in question. The first part of the act prohibits the packing in packages of tobacco of "any article or thing whatsoever, other than the manufacturers' wrappers and labels, the internal revenue stamps and the tobacco or cigarettes, respectively, put up therein." The other portion of the statute prohibited the manufacturer from including in or with his package "any promise or offer of, or any certificate for, any gift, prize, premium, payment or reward."

In the argument of the case before the Circuit Court of Appeals the Government expressly and in terms abandoned reliance upon the second portion of the statute. The counsel for the Government said that this portion of the statute had no bearing upon the issue presented under the information filed, and that the record contained no proof that could bring the case, under any view, within the provision of the second portion of the statute.

It is certainly manifest, upon an examination of the coupon in question in this case, that the second portion of the statute has no applicability to it. The statute was pointed at that which is usually termed a gift enterprise. Its purpose was to prevent lottery schemes and gift enterprises from being coupled with the business of selling tobacco which had government stamps upon the packages. The coupon in question here has none of the characteristics of the lottery or the gift enterprise. The packages containing the coupons do not vary in

weight or size, or in the quantity of tobacco which they contain, or in the value of that which the purchaser acquires by his purchase. Every package contains a coupon. Every coupon is exactly like every other coupon. The purchaser who acquires a coupon with his tobacco obtains an article having a defined value. A certain number of these coupons entitle the holder of them to an article of ascertained kind, quality and value. Every holder of the same number of coupons may obtain an exactly similar article. There is no chance or hazard about the transaction. It is just as though the manufacturer, in order to encourage the sale, had said to the purchaser: "Here is a picture. If you will buy twenty packages of my tobacco, I will give you this picture without charge." The manufacturer does not suggest to the purchaser that in some of these packages there are tickets or certificates entitling the purchaser to obtain something beside the tobacco, and that if he be a lucky man he is likely to happen upon the package containing the certificate. Under such circumstances the purchaser might obtain the prize with the first package purchased, or he might purchase a great number of packages without obtaining any prize. But the coupon in this case involves no such element of chance.

The counsel for the Government therefore recognized that the second portion of the statute could have no application. While this was a perfectly sufficient reason why the counsel for the Government should not attempt to rely upon the second portion of the statute, yet there was also another very good reason for keeping away from it. The second portion of the statute is plainly beyond the constitutional limit of the powers of congress.

The constitution of the United States confers upon congress certain specific and well defined powers. The powers which are thus granted, and the incidental powers necessary for the exercise of those expressly granted, are the only powers which congress possesses. In some directions these powers are broad and far reaching, but their breadth and reach are nevertheless circumscribed within well defined boundaries.

The two parts of this statute, which the Government desires to separate into distinct branches, seem in reality to be very closely allied. It is difficult to conceive that in framing the

statute congress had in mind one class of articles when it enacted the first portion of the statute, and an altogether different class of articles when it reached the second part of the statute. It is much easier to conceive that the entire statute was pointed at the immoral schemes of lottery and gift enterprise, and that the general language in the earlier part was used with the intention that it should be broad enough to supply any deficiencies in the more specific language of the latter part of the statute. However this may be, it is manifest that the latter part of the statute is pointed at schemes involving chance and hazard. Congress attacks these because it conceives them to be injurious to public morals. There is no question of the postal laws involved, nor any question of interstate commerce, nor any question relating to the navigable waters of the country, nor any question affecting the relation between this government and foreign countries, nor, although it is found in a revenue enactment, does the statute have any relation to or bearing upon the revenues, or the ascertaining or collecting of taxes. The printing upon the outside of a package of tobacco of the tempting offer involved in a gift enterprise could not by possibility interfere in any way with the determining of the amount of the tax upon the package, or with the collection of the tax, or with the enforcement in the fullest measure of those minute and particular rules which have been adopted by the Department. Either congress has the general power to legislate against gift enterprises, without regard to tobacco or tobacco packages, or else this portion of the statute is without any constitutional foundation to rest upon. This court has not hesitated to declare that legislation relating to public morals belongs to the states alone. The right to indulge in such legislation has not been granted to congress. In the case of *United States* v. *E. C. Knight Company*, 156 U. S. 1, the CHIEF JUSTICE uses this language:

"It cannot be denied that the power of a state to protect the "lives, health, and property of its citizens, and to preserve "good order and the public morals, the power to govern men "and things within the limits of its dominion, is a power origi- "nally and always belonging to the states, not surrendered by "them to the general government, nor directly restrained by "the constitution of the United States, and essentially exclu-

"sive. * * * It is vital that the independence of the com-
"mercial power and of the police power, and the delimitation
"between them, however sometimes perplexing, should always
"be recognized and observed, for, while the one furnishes the
"the strongest bond of union, the other is essential to the pre-
"servation of the autonomy of the states as required by our
"dual form of government; and acknowledged evils, however
"grave and urgent they may appear to be, had better be borne,
"than the risk be run, in the effort to suppress them, of more
"serious consequences by resort to expedients of even doubtful
"constitutionality."

Gift enterprises may be wrong, and their persistence may be grave and urgent evils, corrupting to the morals of the people. The wisdom of the framers of our government has left with the states the correction of such evils. However much congress may lament their existence it has no power to suppress them, and its legislation attempting to suppress them is unconstitutional and void.

When it has become certain that the latter part of the statute, which in terms relates to gift enterprises, and which according to the counsel for the Government does not apply to this case, is unconstitutional and void, it becomes necessary to inquire whether the two parts of the statute are not so closely knitted together that one cannot stand in case the other falls. The unconsitutionality of the latter part would, in that case, be of itself sufficient to condemn the other. There is no intention to intimate that the fact that one part of a statute is unconstitutional necessarily condemns another part. The legislature may include in the same statute a number of different, separate and independent enactments. One of these may stand, although the others may all be swept away as unconstitutional. This result can only be reached, however, when the different parts are clearly independent of one another. If they are so separated that each may be regarded as a law complete in itself, then one part may stand upon its own foundation, no matter what may become of the other. If it can be seen that the legislative power was treating each part as a separate and complete enactment, and that it would have created each part into a law without regard to the others, then each part may stand by itself. But if two parts of the same

statute be so closely allied and so interdependent one upon the other, that it cannot be seen that the law making power would have enacted the one without the other, then the two parts must stand or fall together. If one be declared unconstitutional, the other must fall with it.

The rule upon this subject is stated in the opinion of this court in *Allen* v. *Louisiana*, 103 U. S. 80, where this language is used:

"It is an elementary principle that the same statute may be "in part constitutional and in part unconstitutional, and that "if the parts are wholly independent of each other, that which "is constitutional may stand while that which is unconstitu- "tional will be rejected. 'But,' as was said by Chief Justice "Shaw, in *Warren* v. *Mayor and Aldermen of Charleston* (2 Gray "(Mass.) 84,) 'If they are so mutually connected with and de- "pendent on each other, as conditions, considerations, or com- "pensations for each other as to warrant a belief that the leg- "islature intended them as a whole, and that, if all could not be "carried into effect, the legislature would not pass the residue "independently, and some parts are unconstitutional, all the "provisions which are thus dependent, conditional, or connected "must fall with them.' The point to be determined in all such "cases is whether the unconstitutional provisions are so con- "nected with the general scope of the law as to make it impos- "sible, if they are stricken out, to give effect to what appears "to have been the intent of the legislature."

When it is considered that certain articles or things included in a tobacco package might be objectionable from the standpoint of the Government, while other articles or things could not possibly be objectionable from this standpoint, it becomes reasonably clear that the use of the general term "any article or thing whatsoever" in the first part of the statute must have been suggested with a definite reference to the specific articles mentioned in the latter part of the statute. If this be so, the statute cannot be separated at the pleasure of the counsel for the Government into two independent enactments, each of which is complete in itself. On the contrary, the more reasonable view would make of it a single statute, whose two parts relate substantially to the same subject and are so closely

allied that one of them cannot survive when the other is compelled to succumb as unconstitutional.

It is not necessary, however, that the plaintiff in error should insist upon this position, or should refuse to follow the counsel for the Government in separating the statute into two independent parts. If the portion of the statute on which the Government relies shall be applied to the coupons which are involved in this proceeding, that portion of the statute, though it be considered alone and without respect to the other, is unconstitutional.

The portion of the statute relied upon by the Government provides that packages of tobacco shall not have packed in them "any article or thing whatsoever, other than the manufacturers' wrappers and labels, the internal revenue stamp and the tobacco or cigarettes, respectively, put up therein." This provision may be given two constructions, a reasonable construction and an unreasonable construction. The question certified to this court with respect to the constitutionality of the statute is limited so as to confine the doubt with respect to the constituaionality of the statute to one of these two constructions. The question reads as follows:

"Whether the Third clause of the Tenth Section of the Act "of Congress of July 24, 1897, *if the prohibition of that statute be "applied to the coupons described in the foregoing statement of "facts*, was in accordance with or in conflict with the Constitu- "tion of the United States."

The construction which the counsel for the Government would place upon this provision of the law gives the fullest effect and the broadest meaning to the words which are used. The language is not considerd with any relation to the other portions of the statute, nor with relation to the situation which existed at the time of the passage of the statute, and which may be thought to have occasioned its enactment, nor with any respect to any purpose or object which congress may be thought to have had in view in enacting the statute. The words are there. The words are plain. The words must be given their obvious meaning. The words apply to any article or thing whatsoever. The only question to be determined is whether the coupon is an article or thing. It is of no consequence whether the coupon has any thing to do with the lottery or the

gift enterprise. Indeed, it makes no difference whether the coupon has any matter of any sort printed or written upon it. If it be a piece of blank paper, it is still an article or thing. If it be large or small, if it be of such weight as to affect the proper ascertainment of the quantity of tobacco in the package, or if it be of absolutely inappreciable weight, that it is of no consequence. The only question to be considered is whether it be an article or thing.

A number of expressions from those in charge of the Government's interests in the Revenue Department are to be found in the record to the effect that the presence of the coupons in the tobacco packages does not in any manner affect these interests. These expressions are contained in official formal documents, but the counsel for the Government, while agreeing to the authenticity of the documents, insist that the court is not to be governed, in ascertaining the facts, by the expressions of opinion of the Government officials. These opinions are given by those who of all others would best know the situation. But it is not necessary that we should insist upon the accepting of these opinions. Certainly the facts which have been agreed to in this particular case are to be taken as true, and among these agreed facts are the following:

"The said coupon is printed on thin paper, is of inappreciable weight, is without any intrinsic value in itself and has "upon it no picture of any kind, and does not affect in any way "the ascertaining of the proper tax payable upon the package, "or interfere in any way with the collection of such tax." (Record 3).

The constitutional question which is presented is, therefore, whether it is within the constitutional power of congress to prohibit the placing in tobacco packages of a thin piece of paper, of inappreciable weight, which does not affect in any way the ascertaining of the proper tax, and does not interfere in any way with the collection of the tax.

Congress is by the constitution expressly given the power to lay and collect taxes, duties, imposts and excises. The power to lay and collect taxes carries with it as an incident the power to provide the manner in which taxes are to be levied and collected, and to make regulations upon this subject. The manner in which this power shall be exercised is to be determined

by congress, and not to be circumscribed by the courts. If congress prescribes a regulation which does not obviously appear to have anything to do with the levying or collecting of taxes, the courts nevertheless sustain the regulation. The courts assume that congress was able to perceive some bearing which the regulation might have upon the levying and collecting of taxes, and give to congress the benefit of the doubt. But how is it when it affirmatively appears that the provision could not have, and does not have, anything to do with the levying or collecting of taxes? How would it be if congress should recite in its own law that the provision which it was proceeding to enact had no relation to the levying or collecting of taxes? Would the courts still hold the law to be valid?

The question presented to the court in this case is whether a law is valid and constitutional which prohibits the placing in the packages of tobacco of a slip of paper which, as agreed by the Government itself, does not in any way affect or interfere with the levying, the ascertaining, or the collecting of the tax. If the presence of the paper in the package has nothing to do with the tax, or with the regulations for ascertaining or collecting it, then congress has manifestly passed beyond its lawful boundaries. The statute might of course be given a construction which would make it apply only to such things as might affect the levy or collection of the tax, and in this manner be kept within the powers of congress. The propriety of such construction is involved in the second of the questions which have been certified to this court. That, however, has nothing to do with the question now under consideration. It is assumed, for the purposes of the present question, that the statute is to be made to apply to this coupon, which, according to the agreed facts, does not by its presence in the package, affect in any way the ascertainment or collection of the tax.

PROPERLY CONSTRUED THE STATUTE DOES NOT APPLY TO THE COUPONS.

It has already been pointed out that the portion of the statute relating to lotteries and gift enterprises is conceded by the Government to have no application to the coupons which are before the court in this proceeding. Without pausing to suggest again the close relation which exists between the two portions of the statute, it is proposed to discuss the present question

wholly with reference to the first portion of the statute. The question as certified is in the following language:

"Whether, if the said section be properly construed, the coupons described in the foregoing statement of facts are within its prohibition." (Record 16).

The question of the constitutionality of the statute cannot be lost sight of in discussing this branch of the case. If the statute is susceptible of two constructions, and the adoption of one of these should lead inevitably to the conclusion that the statute is unconstitutional, while under the other construction the constitutionality of the statute might be maintained, then the latter construction should be adopted. When the statute is so construed that every thing which could properly, and according to the lexicon, be described as an article or thing is covered by it then it becomes unconstitutional. An article or thing which does not affect in any way the ascertainment or collection of the tax is outside of the constitutional limits of congressional power. So long as the rights of the government with respect to taxes are not in any manner interfered with, the citizen has the right to conduct his business to suit himself. If he wishes to use coupons for the purpose of advertising his business, in a legitimate way, and without resort to the immoral schemes of lotteries and gift enterprises, he has the right to do so. Indeed his right to do so is given him by the provisions of the constitution itself. But if the constitution does not in terms accord it, nevertheless this right is among the recognized rights which belong to every citizen. *Butchers' Union* v. *Crescent City Company*, 111 U. S. 746.

If a more reasonable construction be given, this portion of the statute will be so limited as to prohibit the placing in tobacco packages of any article or thing which has anything to do with a gift, prize, premium, payment or reward. Such a construction, however, would lead the statute by another route into the domain of unconstitutionality. Keeping away then from the latter portion of the statute, let the former part be so construed as to prohibit the placing in tobacco packages of any article or thing which could in any manner affect the levying, the ascertaining, or the collecting of the tax. This portion of the statute might then be said to be within the legitimate constitutional powers of congress. If one construction

shall make it unconstitutional and if the other construction shall leave it within the constitutional powers of congress, surely the latter should be adopted.

When the meaning of a statute is to be ascertained by the courts it is proper to consider the situation at the time when the statute was passed, the evil which existed and for which the statute was intended to provide the remedy. This court in its opinion in the case of *Platt* v. *Union Pacific Railroad Company*, 99 U. S. 48, used these words:

"We are seeking for the intention of congress, and to dis-"cover that we may look at the paramount object which con-"gress had in view, as well as the means by which it proceeded "to accomplish that object. * * * All will concede that in "construing the Act of 1863 we are to look at the state of "things existing and in the light then appearing seek for the "purposes and objects of congress in using the language it did. "And we are to give such construction to that language if pos-"sible, as will carry out the congressional intentions."

Before the passage of the statute which is now under consideration, it had been the custom for manufacturers to include in their packages of tobacco various articles of merchandise having bulk and weight and an intrinsic value of their own. These articles were given to the purchasers of the packages, or of some of the packages, along with the tobacco purchased. Every package did not contain one of these articles and there was therefore involved an element of chance. But, apart from the element of chance, these articles affected the quantity and weight of the tobacco included in the package. For this reason their presence might be thought to have some effect upon the working out of the rules which had been adopted in aid of the collection of the revenue. With this situation before it and with this evil to be remedied, congress passed this statute prohibiting the including in a package of any article or thing whatsoever other than the tobacco.

It seems obvious that when congress was thus pointing its legislation at the evil which it sought to remedy, the general words which it might use should be held to apply only to those things which had to do with the evil. The general words ought not to be applied to things which, as is set forth in the agreed statement in this case,

have nothing whatever to do with the evil. In order to escape this manifest conclusion, the counsel for the Government presented in the lower court an ingenious, though unsound argument, with respect to what was the real situation at the time of the passage of the act. The evil and the remedy were to be looked at in construing the law, and this situation as presented by the counsel for the Government involved coupons and nothing else. The only objectionable practice then in vogue was, according to the argument, that of including in tobacco packages bits of paper of no value, and of inappreciable weight, and having nothing whatever to do with a lottery or gift enterprise.

It is set forth in the agreed statement that the practice of packing coupons in tobacco packages had been followed throughout the country for ten or more years, and that "during some portions of the same period a practice had been followed by some manufacturers of placing in their packages of tobacco other articles, such as pen knives, pictures and other things." (Record 3, 4).

In November 1891 the Commissioner of Internal Revenue issued Circular Number 371. In this circular the following statement was made: "A practice has grown up, which seems to be on the increase, by which manufacturers have included in statutory packages many foreign articles. This practice should be discontinued. A package of tobacco means a package containing tobacco and nothing else." Now the ingenious argument for the Government in the court below was that after the issue of Circular No. 371 the practice of packing these other foreign articles had ceased. This circular prohibited them, and it is not to be inferred that the practice of including them in the packages had continued in disobedience of the circular. The agreed statement says that the use of coupons had been followed for ten or more years, and consequently the use of the coupons had not ceased after the issue of Circular No. 371. But the agreed statement only says that the practice of packing other articles in the packages had been followed during some portions of the same period. As the time previous to November 1891 was a portion of this period of ten or more years, the inference was drawn that these other foreign articles had been packed in the packages of tobacco dur-

ing that portion of the period which preceded November 1891, but not afterwards.

While the argument was ingenious it was not supported by the facts. The language of Circular No. 371 is as broad and inclusive as is the language of the statute which is under consideration. The circular says a package of tobacco means a package containing tobacco and nothing else. The act says that the manufacturer shall not include in his packages any article or thing whatsoever. If the language of the act is broad enough to cover and include coupons, surely the language of the circular is broad enough to do the same thing. If it is to be inferred that the practice of packing other foreign articles ceased because the circular prohibited them from being packed, it must also be inferred that the packing of coupons ceased, because they are just as plainly included in the language of the circular.

The truth is, as is fairly to be inferred from the agreed statement of facts, the practice of packing other foreign articles was not discontinued after the issue of Circular No. 371, any more than the practice of packing coupons was discontinued. There was no statute in existence relating to either class of articles. There was no legal penalty imposed upon either practice. When congress in 1897 approached the subject of the act which is before the court, congress evidently had in mind these other foreign articles, and particularly had in mind those articles which involved chance and hazard and the characteristics of the lottery or gift enterprise.

The situation which was before congress was this: The practice existed of including in tobacco packages foreign articles of various kinds. Some of these articles affected the size and weight of the package. The practice in some respects involved the elements of the immoral gift enterprise. Congress passed an act one portion of which was manifestly pointed at those who placed in their packages of tobacco articles which were objectionable from the moral point of view. Another portion of the statute may be said to be broad enough to apply to articles which affected the size or weight of the package, and in consequence might be thought to affect the proper determination and collection of the tax. With respect to the former of these two classes, congress did not have the constitutional

power to legislate. With respect to the latter of these two classes congress had the power to legislate. In carrying out this power congress used language which, taken literally, may be broad enough to include the coupon, whose presence in the package did not interfere in any way with the ascertainment or collection of the tax. When it becomes necessary to ascertain the true meaning of this enactment, the language should be read in view of the situation. Attention has already been called to the rule upon this subject as it is stated by this court in *Platt* v. *Union Pacific Railroad Company*, 99 U. S. 48.

When this rule shall have been applied, the proper construction of the statute will so limit its language as not only to keep it within constitutional bounds, but to confine it to the real evil at which the statute was pointed. The language will not be extended so as to apply to those things which, according to the facts agreed to, do not in any wise affect the interests of the Government in the ascertainment or collection of the tax, or otherwise.

It is claimed, however, that the court will not inquire into the extent or degree to which the legislation of congress should go. If congress has the power to say that an article of one kind shall not be included in the package of tobacco, then it may pass a general law which shall prohibit the including of any article whatsoever. The court will recognize the power of congress to prohibit one article and will not undertake to measure or limit the extent to which that power may be pushed. To do so would be to accord to congress the right to legislate upon the subject, but to restrict or limit the methods which congress might adopt in carrying out its general power.

Here again we are confronted with plausibility, but with that only. To say that congress has a general power to prescribe what shall or shall not be contained in a tobacco package, is to say in effect that congress has the general power to legislate upon the manner in which business shall be conducted by citizens of the country. If congress has any power in regard to packages of tobacco, that power is based wholly upon the right of congress to levy and collect taxes, and to legislate upon such matters as affect or pertain to the levying and collecting of taxes. If the including of an article in a tobacco package affects the levy or collection of the tax, then congress

has the right to legislate with regard to it. If it does not affect in any wise the levy or collection of the tax, then congress has no right to legislate with regard to it. Now it is agreed in this case, and the fact must be taken as established for all the purposes of the case, that the coupon in question "does not affect in any way the ascertaining of the proper tax payable upon the package or interfere in any way with the collection of such tax." (Record 3). It is also agreed "that the Internal Revenue Bureau does not hold it to be essential to an honest and full collection of the tax upon manufactured tobacco, to prohibit the introduction into statutory packages of coupons, used purely for advertising purposes, immaterial in weight and size." (Record 15).

Even the broadest and most general language must be restricted in its application and confined to the manifest purpose of the statute. In the case of *Reiche* v. *Smythe*, 13 Wall. 162, this court had before it the construction of the act of May 16, 1866, which provided:

"That on and after the passage of this act there shall be "levied, collected, and paid, on all horses, mules, cattle, sheep, "hogs, and *other live animals* imported from foreign countries, "a duty of twenty per cent. *ad valorem*."

A lot of canary and other birds were imported on which the collector exacted the duty provided for by this statute, and the question before the court was whether this exaction was proper. Mr. Justice Davis in delivering the opinion of the court used this language:

"The Act of 1866 in its terms is comprehnsive enough to in- "clude birds, and all other living things endowed with sensa- "tion and the power of voluntary motion, and if there had not "been previous legislation on the subject there might be some "justification for the position, that congress did not intend to "narrow the meaning of the language employed. If it be true "that it is the duty of the court to ascertain the meaning of the "legislature from the words used in the statute and the subject "matter to which it relates, there is an equal duty to restrict "the meaning of general words, whenever it is found necessary "to do so, in order to carry out the legislative intention."

In the statute under consideration in the present case, it is necessary to restrict the meaning of general words not only in

view of the situation which was before congress when the law was enacted, but also in order to avoid giving the statute a construction which would render it unconstitutional.

THE SEIZURE AND JUDGMENT WERE NOT JUSTIFIED UNDER SECTION 3453 OF THE REVISED STATUTES.

The only portion of Section 3453 which could be thought to have any possible application to the case at bar is in these words:

"All goods, wares, merchandise, articles, or objects, on which "taxes are imposed, which shall be found in the possession or "custody or within the control of any person, for the purpose "of being sold or removed by him in fraud of the Internal Rev- "enue laws, or with design to avoid payment of said tax, may "be seized by the Collector or Deputy Collector of the proper "district, or by such other Collector or Deputy Collector as may "be specially authorized by the Commissioner of Internal Rev "enue for that purpose, and shall be forfeited to the United "States."

The tobacco in question here was not proceeded against because the taxes had not been duly and fully paid. So far as appears the packages were all properly stamped and the stamps were all properly cancelled. The tobacco was proceeded against for the specific reason that the packages contained the coupons. It cannot be said therefore that these packages were in the possession of any person for the purpose of being sold with design to avoid payment of the taxes. To bring the packages within the other portion of the section and to show that they were in the possession of any person for the purpose of being sold or removed by him in fraud of the Internal Revenue laws, it will be necessary to convince the court that the mere presence of the coupon in the package constituted a fraud upon the revenue laws.

In answer to this suggestion it will be sufficient again to refer to the agreement of the Government that the coupon does not affect in any way the ascertaining of the proper tax, nor interfere in any way with its collection, and that the Government does not hold it to be essential to an honest and full collection of the tax to prohibit the introduction of the coupon.

If the coupon does not interfere with the ascertaining or collecting of the tax, its presence in the package cannot constitute a fraud upon the internal revenue laws.

THE SEIZURE AND JUDGMENT WERE NOT JUSTIFIED UNDER SECTION 3456 OF THE REVISED STATUTES.

So much of Section 3456 as may be claimed to be applicable is in these words:

"If any manufacturer of tobacco or cigars, shall knowingly "or willfully omit, neglect, or refuse to do or cause to be done "any of the things required by law in the carrying on or con- "ducting of his business, or shall do any thing by this Title "prohibited, if there be no specific penalty or punishment im- "posed by any other section of this Title for the including, "omitting or refusing to do, or for the doing or causing to be "done the thing required or prohibited, he shall pay a penalty "of one thousand dollars; and if the person so offending be a "manufacturer of tobacco or cigars, all tobacco or cigars found " in his manufactory shall be forfeited to the United States."

In considering the applicability of this section to the case at bar, it may be assumed that the Act of 1897 is constitutional in all its parts, that it applies to the coupons which are involved in the case, and that the packing of these coupons in the packages was prohibited by the provisions of that Act. Starting with these assumptions, it is then to be ascertained whether Section 3456 authorized, under the facts presented to the court, the seizure of the packages and the judgment of forfeiture.

This section provides that if a manufacturer shall do what is prohibited, and if no specific penalty be imposed by any other section, then the manufacturer shall be fined one thousand dollars. It is further provided that under these circumstances the tobacco found in his manufactory shall be forfeited.

In the case which is before the court no manufacturer has been proceeded against for the doing of anything prohibited by law. It is not alleged or shown that any person packed the objectionable coupons in the packages which were seized. It may be inferred, perhaps, that some one must have packed these coupons in the packages, for otherwise the coupons would not

have been present. But no manufacturer is proceeded against for any thing.

The provision of the section which relates to the forfeiture of the tobacco is manifestly intended to impose upon the manufacturer an additional penalty. If he be convicted of the unlawful act, then he must pay the penalty of one thousand dollars, and then also, and because of his unlawful act, the tobacco found in his manufactory is to be forfeited. The tobacco is not forfeited because the tobacco has not been properly packed, or because it contains things which are contrary to the law. It is forfeited because of the unlawful act committed by the manufacturer. The tobacco itself may be in perfectly unobjectionable packages. It may have been properly stamped. It may comply in every respect with all the provisions of the law. The crime of the manufacturer may have had nothing whatever to do with the tobacco found in his manufactory. Yet that tobacco is to be forfeited because of the manufacturer's unlawful act.

In the case at bar the tobacco itself was proceeded against. No person was indicted. No act of any person was complained of. The tobacco, and it alone, was brought before the court. The complaint against it was that in every package there was an objectionable coupon. Certainly Section 3456 does not contain any provision which, under the circumstances of this case, could be thought to warrant the seizure of this tobacco or the judgment of forfeiture which was rendered against it.

The only excuse which can be offered for invoking this particular section of the Revised Statutes in aid of the Govern ment's case is the fact that no other section of the Revised Statutes, and no other provision of any Act of Congress contains any authority for such a proceeding as the present.

HENRY M. RUSSELL,

Of Counsel for Plaintiff in Error.

No. 205.

Br. of Atty. Gen.

for D. C.

Filed Feb. 24, 1902.

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In the Supreme Court of the United States.

OCTOBER TERM, 1901.

EMANUEL FELSENHELD, CLAIMANT OF 288 packages of "Merry World Tobacco," plaintiff in error,
v.
THE UNITED STATES OF AMERICA, DEFENDANT in error.
} No. 205.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR,

BY

JAMES M. BECK, ASSISTANT ATTORNEY-GENERAL, AND CHARLES J. FAULKNER, SPECIAL COUNSEL FOR THE GOVERNMENT.

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STATEMENT OF THE CASE.

Prior to the 4th of November, 1891, it had been the practice and custom of the manufacturers of smoking tobacco to include in sealed packages of tobacco articles of weight and value (Record, 4), which, by circular No. 371 issued by Commissioner of Internal Revenue Mason, was prohibited (Record, 4). Between 1891 and 1897 the manufacturers of smoking tobacco, under circular No. 371, ceased to include such articles in said packages, *but substituted for them coupons*, which were included in these sealed packages, similar to

those set forth in the information (Record, 2 and 3), as shown by the statement of facts (Record, 9 and 10). This practice seems to have been permitted by the Department, as there was no provision of law prohibiting it.

The attention of Congress being called to this practice (the only one then existing where anything was included in the sealed packages of smoking tobacco), on the 24th day of July, 1897, in what is known as the "Dingley bill," passed a law which will be found as the third clause of the tenth section of said act, amending section No. 3394 of the Revised Statutes of the United States, as amended, as follows:

> None of the packages of smoking tobacco or fine-cut chewing tobacco and cigarettes prescribed by law shall *be permitted to have packed in*, or attached to, or connected with, them any article or *thing whatsoever*, other than the manufacturers' wrappers and labels, the internal-revenue stamp and the tobacco or cigarettes, respectively, put up therein, on which tax is required to be paid under the internal-revenue laws; nor shall there be affixed thereto, or branded, stamped, marked, written, or printed upon said packages or their contents, any promise or offer of, or any order or certificate for, any gift, prize, premium, payment, or reward.

On the 24th day of July, 1897, Commissioner Forman issued a Department circular, No. 106, Internal Revenue No. 477, instructing the collectors of internal revenue in the several districts, among other things, to

notify manufacturers of tobacco of the provisions of the statute heretofore cited, and that a violation of the same would subject the property to seizure. (Record, 5 and 6.)

Commissioner Forman, on August 2, 1897, issued Department circular No. 115, Internal Revenue No. 479, for reasons not stated, modifying his instructions in the previous Departmental circular No. 106, directing that before seizure of the property for violations of this provision of the law the matter should be referred to his office for instructions. (Record, 6).

Commissioner Forman, in his report made to the Secretary of the Treasury, 1897, recommended that this law be amended so as to authorize the Commissioner of Internal Revenue to prescribe, by regulations, what such packages may contain. (Record, 7.)

In February, 1898, Commissioner Scott recommended that this clause of section 10 be amended by authorizing the inclosure in packages of tobacco of coupons similar to the one set out in the information, stating that, under the existing law, the office of the internal revenue did not permit the same to be inclosed (Record, 8), and, subsequently, on the 20th of May, he addressed a letter to a member of the Senate suggesting a further amendment permitting such coupons to be put in packages of tobacco, subject to such regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe (Record, 9). No action was taken by Congress modifying the statute as suggested by Commissioner Scott.

On August 6, 1898, Commissioner Scott addressed a letter to the Secretary of the Treasury reviewing this matter, alleging that some of the manufacturers had continued the practice, and suggesting that a test case be brought to determine the legal questions involved. (Record, 10.) Accompanying said letter was a "proposed circular" prepared by the manufacturers themselves, in which they provided, by regulation, the *weight of the article or thing* that could be packed in a package of tobacco. (Record, 10 and 13.) The letter of Commissioner Scott was referred by the Secretary of the Treasury to the Attorney-General, and on August 19, 1898, the Assistant Attorney-General, James E. Boyd, forwarded his opinion to the Secretary of the Treasury in which he expressed the opinion, "this legislation undoubtedly involved several important legal questions which I think should be passed upon by the courts" (Record, 14), and concluded his opinion by the following suggestion: "I would suggest, therefore, that the Commissioner of Internal Revenue cause to be instituted through some one of the collectors, a proceeding by which the validity and scope of this law can be tested by the courts." (Record, 15.)

In pursuance to the suggestion of the Attorney-General's Office, on October 17, 1898, the district attorney filed information against 288 packages of "Merry World Tobacco" and monition issued upon such information, and the property seized by A. B. White, collector of internal revenue for the district of West Virginia, in said district, was attached and taken

into posession by the marshal of said district, April, 1899 (Record, 2).

At the time of the seizure of the said tobacco by the said White, there was in each of said packages a small slip of paper called a coupon, with printed words and figures on both sides thereof, which coupon had been placed within such package at the time when it was packed in the manufactory and prepared for sale (Record, 2.)

At the October term, Emanuel Felsenheld appeared in open court and claimed the said property (Record, 9), and in open court admitted the value of the same to be $54, agreeing that it might be considered of that value for all purposes, and prayed leave to enter into bond in accordance with the practice in such cases (Record, 3).

It was—

> further agreed that for a considerable time before the institution of the present case there had been frequent complaints made to the Government by private persons or corporations, who were interested in the DISCONTINUANCE BY THE DEFENDANT and others of the USE OF SAID COUPONS (Record, 15).

And further—

> it was because of said complaints that the above entitled case was instituted and being prosecuted, and also because of the insistence by private persons or corporations, who were interested in the CONTINUANCE BY THE DEFENDANT and others, in the USE OF SAID COUPONS (Record, 15),

which admission was that the *defendant*, as a *manufacturer*, had packed in said packages said coupons.

That if admissible evidence, the record shows, that in the opinion of Commissioner Mason (Record, 4), Commissioner Forman (Record, 8), Commissioner Scott (Record, 10), and the manufacturers of smoking tobacco (Record, 13), they *regarded that it was necessary* in the *interest of the Government*, either *by law* or *departmental regulations*, that this subject should be controlled and regulated.

> But as to the several documents and expressions of opinion by departmental officers hereinbefore contained, the genuineness of said documents and the fact that such expressions of opinion were made, is admitted, and *not the relevancy of said documents and expressions, nor the truth of any fact stated in them nor the correctness of any such opinions* (Record, 12), and:

On the 4th of April, 1899, an order was entered by which it was agreed between the United States and Emanuel Felsenheld to "*waive any and all formalities and omissions, should any such be found in these proceedings on either side.*" In April, 1900, the case, by agreement of parties waiving a jury, was submitted to the court for its decision and issue joined on the information. At the same time an agreed statement of facts, in writing, signed by the United States district attorney and the attorney for the said defendant, was filed and made a part of the record (Record, 1–14), and the judge, acting in lieu of a jury, rendered his opinion, holding that "the tenth section of the act of July 24, 1897, under which this information was filed, is a constitutional exercise of legislative power by Congress;

that the claimant and defendant willfully and knowingly violated the provisions of said statute by packing in the 288 packages of tobacco seized the coupons described in the record; and that the seizure and attachment for the violation of the provisions of the statute was legal and valid," and judgment of forfeiture was thereupon rendered (Record, 15).

Exception was taken to the ruling of the court and petition filed for a writ of error (Record, 15).

After argument before the circuit court of appeals for the fourth circuit, the court indicated to counsel that in its judgment certain questions should be certified to this court for its determination. Thereupon the following questions were certified (Record, 16):

> **First. Whether the third clause of the tenth section of the act of Congress of July 24, 1897, if the prohibition of that statute be applied to the coupons described in the foregoing statement of facts, was in accordance with or in conflict with the Constitution of the United States.**
>
> **Second. Whether, if the said section be properly construed, the coupons described in the foregoing statement of facts are within its prohibition.**
>
> **Third. Upon the facts stated, was the seizure set forth in the information of the packages of Merry World tobacco therein described, or was the judgment of forfeiture rendered in this case justified under section 3453 of the Revised Statutes?**
>
> **Fourth. Upon the facts stated, was the seizure set forth in the information of the packages of Merry World tobacco therein described, or was the judgment of forfeiture rendered in this case justified under section 3456 of the Revised Statutes.**

Before entering into the discussion of the questions certified by the circuit court of appeals, it is deemed

proper, that the attention of the court should be directed to several suggestions which are apparently relied upon by the plaintiff in error, the solution of which will tend to abreviate the discussion of the questions certified.

It is submitted to the court, that the expressions of opinion by the officers of the Internal Revenue Bureau, as to the wisdom or necessity of the enactment of the third clause of the tenth section of the act of 1897, are not relevant testimony in considering the constitutionality of that enactment.

In determining the constitutionality of the act, the only rule which we are aware of that would justify the court in considering the acts of executive officials is, that which holds, that in cases where the construction of the act is doubtful,

That a long continued construction of the statute adopted and acted upon by executive officers is persuasive on the court in construing the same.

This rule refers to the *acts* of such executive officials upon whom is devolved the duty of acting under such statute, but not to any expression of opinion as to the wisdom or necessity of the enactment; such evidence is clearly irrelevant.

The Government, when it agreed to permit the expressions of opinion of certain officers of the Internal Revenue Bureau to be included in the facts agreed, made the following reservation:

> But as to the several documents and expressions of opinion by the Department officers hereinafter contained, the genuineness of said documents and the fact that said expressions of

> opinion were made is admitted, and not the relevancy of said documents nor the truth of any facts stated in them nor the correctness of any such opinions (Record, 2).

And on page 15 the following reservation is made:

> The right is reserved to either party to object at the hearing to the relevancy of anything contained in this statement.

The constitutional right of the Congress to enact a provision of law, can not be made to rest upon the fluctuating opinions of Commissioners of Internal Revenue, as to the necessity for the regulations, which, in the judgment of Congress, are deemed essential in the enforcement of the collection of the revenue of the Government. No better illustration of the weakness of this position of the plaintiff in error could be shown than in the case at bar. The record shows, that Commissioner Miller approved a provision substantially the same as found in the tenth section. It shows that Commissioner Mason, without authority of law, was compelled to intervene and prohibit the inclosure of articles in packages of tobacco to prevent *fraud* in the collection of the revenue (Record, 4). On the other side, it tends to show that Acting Commissioner Forman, at one time, was in favor of the repeal of this provision so far as it affected the use of coupons (Record, 6 and 7), and Commissioner Scott was in favor of the amendment of the law permitting coupons of certain weight to be included in said packages, provided,

> that in determining the weight of these packages for purposes of taxation, the weight of

> inclosed labels, advertisements, and vouchers shall be included (Record, 9).

But no expression of opinion was given by Commissioner Wilson as to his judgment in reference to this matter, although he was at the time this suit was instituted, and when it was submitted the head of the Internal Revenue Department of the Government.

It must be recognized by the court as an unsound position, that such testimony should be introduced as relevant upon the question submitted for its decision: Had Congress the constitutional power to enact this provision?

If such evidence is relevant to the inquiry submitted to the court for its adjudication, the question would arise in every case in which the constitutionality of a custom or revenue regulation was raised, not whether the act upon its face is constitutional and within the granted powers of the Congress, but whether in the judgment of a subordinate executive official, such regulations were "not absolutely necessary, but appropriate and not prohibited, but really calculated to effect the objects intrusted to the Government," which in this case involves the *weight* of the package (*Hepburn* v. *Griswold*, 8 Wallace, 615), or, as expressed in a different form by Justice Peckham, in 173 U. S., 524:

> Whether the means adopted were the best and most convenient to accomplish that purpose was a question for the judgment of Congress, and its decision must be conclusive in that respect.

Justice Peckham, in this quotation, recognizes the distinct proposition of law, that if Congress has the con-

stitutional power to enact regulations regulating and protecting the collection of the revenue of the Government over a particular subject-matter, that the "means adopted" by the Congress is "conclusive" upon the courts. This decision, one of the latest rendered, cuts up by the roots the proposition of the claimant, that in this case, he can introduce testimony as to the "*degree of necessity*" (12 Wallace, 539) for the enactment of this provision, based upon the judgment of an executive official.

Mr. Russell on page 13 and Mr. Warner on page 25 of their briefs, virtually admit the constitutional power of Congress to exclude from tobacco packages "articles or things," such as, in their construction of this statute, it applies to; and Commissioner Scott, as heretofore quoted, regards it important, if this statute is modified so as to prevent the use of coupons, that the weight of the coupons should be included as a part of the package and taxed as tobacco.

These admissions of the plaintiff in error, through his counsel, that Congress had the right to prohibit *certain articles or things* from being included in packages of tobacco, in our judgment, surrenders the entire contention made in their briefs on this point, as under the decisions of 12 Wallace, 539; 173 U. S., 524; 8 Wallace, 615; and, as stated by Chief Justice Marshall in *McCullough* v. *State of Maryland* (4 Wheaton, 423):

> To undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to

> tread on legislative ground. This court disclaims all pretensions to such a power.

This doctrine of Marshall's is fully sustained in 165 U. S., 537, where, in speaking of the oleomargarine law, the court says:

> Protection to purchasers in respect of getting the real and not the spurious article can not be held to be the primary object in either instance, and the identification of dealer, substance, *quantity*, etc., by marking and branding must be regarded as means to effectuate the objects of the act in respect of revenues.

Tobacco is taxed by weight and is put up in packages in quantities prescribed by law.

Can the latter paragraph of the third clause of the tenth section influence the issues presented by the record?

Counsel for plaintiff in error devote much time to the discussion of the constitutionality, and the relation of the last paragraph in the third clause of the tenth section, which reads as follows:

> Nor shall there be affixed thereto, or branded, stamped, marked, written, or printed upon said packages or their contents any promise, or offer of, or any order or certificate for, any gift, prize, premium, payment, or reward.

Although admitting that the Government has always insisted that a judgment of forfeiture of the property described in the information rests upon the violation of the first clause of said section, which reads as follows:

> None of the packages of smoking tobacco and fine-cut chewing tobacco prescribed by law

> shall be permitted to have packed in, or attached to, or connected with them, any article or thing whatsoever, other than the manufacturer's wrappers and labels, the internal revenue stamp and the tobacco or cigarettes, respectively, put up therein, on which tax is required to be paid under the internal-revenue laws.

We will examine the contention made by the plaintiff in error—

First. As to the proper construction to be given to the third clause of the tenth section of the act of 1897; and

Second. Whether the two paragraphs of said clause are so dependent one upon the other that both must stand or fall together.

An examination of this third clause will convince the mind of the court that the Congress, in the enactment of it, had two distinct objects in view, which they expressed in the two paragraphs of said clause:

First. What is the true construction of the first paragraph of the third clause of the tenth section?

An analysis of the first paragraph will show the purpose of Congress to define clearly and explicitly what should constitute a package of smoking or chewing tobacco, which is accomplished by both negative and affirmative provisions.

Three distinct offenses are denounced by the first paragraph of this clause:

1, packing in,
2, attaching to, and
3, connecting with

any

> package of smoking tobacco or fine-cut chewing tobacco * * * any article or thing whatsoever.

The Congress, recognizing the necessities growing out of the character of the business they were legislating in reference to, and that the language used, as above quoted, was sufficiently broad and comprehensive to exclude everything except tobacco, which would have necessarily interfered with the packing of said tobacco in many of the kinds of coverings that were then used in the business, declared affirmatively in the same paragraph what, in its judgment, should constitute such a package, both as to its contents and as to the exterior wrapper:

1, the manufacturer's wrapper,
2, the manufacturer's labels,
3, the internal-revenue stamp, and
4, the tobacco or cigarettes.

The court will observe that this affirmative declaration of what should constitute a package of tobacco limited the comprehensive term used in this paragraph. This paragraph determines clearly and definitely what shall constitute a LAWFUL PACKAGE of tobacco or cigarettes if Congress had the constitutional power to enact the provision.

This paragraph is complete in itself and effectual in carrying out the purposes and objects of the Congress. It is capable of being executed and enforced in accordance with the legislative intent, wholly independent of the second paragraph of said clause.

The first count found in the information rests upon this first paragraph (Record, 1), and the evidence

found in the case agreed, sustains the allegation of the first count, to wit:

> There was in each of said packages a small slip of paper called a coupon, * * * which had been placed within such package at the time when it was packed in the manufactory and *prepared for sale.* (Record, 2.)

What is the true construction of the second paragraph of the third clause of the tenth section?

We can not agree with the views expressed by the counsel for the plaintiff in error in their construction of the second paragraph of the third clause of the tenth section of this act. It provides—

> Nor shall there be affixed thereto, or branded, stamped, marked. written, or printed upon said packages, or their contents, any promise or offer of, or any order or certificate for, any gift, prize, premium, payment, or reward.

The Congress having determined by the first paragraph what shall constitute a *lawful package* of tobacco, proceeds to define a new and distinct offense, not in any way linked to or connected with the first paragraph, but entirely independent of it.

When this paragraph is analyzed, no doubt of the purpose or intention of the Congress, in its enactment, will embarrass the court. Whatever may be thought as to its constitutionality, which, in our judgment, is not involved in the decision of the questions certified to this court, its meaning and purpose is not involved in doubt.

No "promise or offer of, or any order or certificate for any gift, prize, premium payment, or reward" shall be—

1, attached to the package;

2, or branded, stamped, marked, written, or printed upon said package;

3, or branded, marked, stamped, written, or printed on their contents.

The violation of any of these prohibited acts would, if that provision is constitutional, constitute a distinct offense entirely independent of any provision found in the first paragraph.

In the argument submitted by the counsel for plaintiff in error it is only necessary to meet their construction of this paragraph, to refer to the third offense defined by it. It is suggested, why has Congress in the second paragraph provided that "no promise or offer, etc., of any gift, prize, premium payment or reward shall be branded, stamped, marked, written or printed on their contents," if the first paragraph prohibits "any article or thing whatsoever" from being placed in said packages. If the Congress deemed it wise to enact a provision prohibiting such a promise or offer as is described in the statute from being connected with or included in packages of tobacco, and it had the constitutional right to do so, it was necessary to pass this provision constituting this offense, as it had in the first section authorized the packing of the manufacturers' wrapper in said tobacco packages, it would not have been in violation of the first paragraph to have printed upon the manufacturers' wrapper, author-

ized by the first paragraph, the contents found upon the coupons which were packed in the packages seized in this case. The printing upon said wrapper, could not, under any construction, have been construed as violating the provision prohibiting packing in such packages "any article or thing whatsoever."

This illustration draws the clear distinction between the first and second paragraphs, and must satisfy the court that the case at bar falls only within the influence of the first paragraph.

In addition to the manufacturers' wrapper which is permitted under the first paragraph to be placed in the package of tobacco, that paragraph also provides for packages of cigarettes (which are usually wrapped with paper), and this provision of the second paragraph would have prohibited the "branding, printing, stamping, etc., of any promise or offer of any gift, premium, or reward," etc., upon the wrappers of which these cigarettes are made. It might be suggested that this illustration of the legislative purpose could not be true, as printing or stamping a promise or offer upon the paper in which cigarettes are wrapped would be consumed in the use. Those who framed this paragraph were more familiar with the details of the tobacco business than the layman in the methods of the manufacture of cigarettes. Such a promise or offer could have been printed upon said paper to deliver an article based upon the number of empty cigarette boxes or trade-marks of a particular company, when returned to that company.

Second. Are these two paragraphs of said clause so dependent one upon the other that they both must stand or fall together?

We contend that the question of the constitutionality of the offenses described in the second paragraph, will not be passed upon by the court in a case, in which the record shows that the judgment rendered of forfeiture of this property, comes alone within the influence of the first paragraph; that the offense denounced in the first paragraph, is not affected by any provision contained in the second paragraph; that the offense defined in the first paragraph is in no way dependent upon, nor is it modified or controlled by, any provision found in the second paragraph; that the court could, if it deemed right and proper, hold the second paragraph to be an unconstitutional exercise by the Congress of the powers granted to it, and yet it would in no way affect the enforcement of the provisions of the first paragraph, if the court should be of the opinion that it was a constitutional exercise of legislative power. It is immaterial how closely the valid and invalid provisions are shown in the act, if distinct and separable. (*Commonwealth* v. *Hitchins*, 5 Gray (Mass.), 482.)

These two paragraphs not being dependent, conditional, or connected, but being wholly independent of each other, must each be separately tested as to its constitutionality. (*Allen* v. *Louisiana*, 103 U. S., 80; *Pollock* v. *Farmers' Loan and Trust Co.*, 158 U. S., 601.)

We understand the purpose of Congress in the enactment of the first paragraph, was to protect the

Government in the collection of its revenue, laid upon an article in which it had determined that the *weight* of the article taxed, should determine its *rate.*

We assume that the purpose of the Congress in the enactment of the second paragraph, was to prohibit the instrumentalities, which it deemed necessary to employ in the collection of a tax on tobacco, from being made the vehicle or channel "*to assist in the dissemination of matter condemned by its judgment.*" (*In re Rapier* 143, U. S., 145.)

In the discussion of the questions certified by the circuit court of appeals for the fourth circuit to your honorable court for its opinion, we will ask the indulgence of the court to change the order, in which the same were certified, and discuss first the second question asked by said court:

Whether if the said section (referring to the third clause of the tenth section of the act of Congress of July 24, 1897) be properly construed, the coupons described in the foregoing statement of facts, are within its prohibition.

We understand this question to present the inquiry whether, assuming the third clause of the tenth section to be constitutional, it is the opinion of the court that, if properly construed, it would exclude from packing in said packages of tobacco, coupons of the character described in the information.

To sustain the contention of the plaintiff in error, that the proper construction of the first paragraph of the third clause of the tenth section, was not intended by Congress to exclude the packing in packages of tobacco

"coupons or vouchers," counsel have referred to the circulars found in the agreed statement of facts from the Commissioners of Internal Revenue, giving expression to their opinion of the necessity for such legislation, the relevancy of which we have previously discussed.

They further rely upon the case of *Platt* v. *Union Pacific R. R. Co.* (99 U. S., 48), in which the court uses this language:

> All will concede in construing the act of 1863 we are to look at the state of things existing, and in the light then appearing seek for the purposes and objects of Congress in using the language it did. And we are to give such construction to that language, if possible, as will carry out the Congressional intentions.

They also rely upon the case of *Maxwell* v. *Dow* (176 U. S., 581), in which the court in speaking of the construction of a constitutional amendment uses the following language:

> The language of a constitutional amendment should be read in connection with the new condition of affairs out of which the occasion for its adoption may have arisen and then construed * * * so far as it is reasonably possible to forward the known purpose or object.

There is another principle, applied by the courts in the construing of statutes, and which has been fully sustained and acted upon by your honorable court in the case of *Thornley* v. *United States* (113 U. S., 113):

> Where the meaning of the statute is plain it is the duty of the courts to enforce it according

> to its obvious terms. In such a case there is no necessity for construction.

We shall attempt to answer the second question certified, first, by showing that the cases of *Platt* v. *Union Pacific R. R. Co.* and *Maxwell* v. *Dow* are not applicable in the consideration of this question, but that it is controlled by the principle announced in *Thornley* v. *United States*, and, secondly, that if the court looks into—

> "the state of things existing" at the date of the enactment of this law or "to the condition of affairs out of which the occasion for its adoption may have arisen"—

it will be satisfied, that it was the intention of Congress to include "coupons and vouchers" in its prohibition.

Is not the meaning of the statute perfectly plain? Is the language used susceptible of two constructions? Does it not prohibit the *packing in* with smoking tobacco or cigarettes "*any article or thing whatsoever?*" No doubt can exist that the "coupon or voucher" is an "*article or thing.*" Congress, however, to avoid any possibility of misunderstanding upon the part of the executive officers, or the court, if it was necessary to pass upon it, was not satisfied to permit its intention to rest upon a negative prohibition, but deemed it wise to declare affirmatively, the particular "article or thing" which should be included in a *sealed package of tobacco*—first, *manufacturers' wrappers*, and, secondly, the *tobacco* or *cigarettes* inclosed therein. The language of this section leaves nothing for construction.

By providing the articles that may be included, it excludes by necessary intendment, all "articles or things" not mentioned therein.

Should the court, however, not agree with the contention of the Government, that the language of the paragraph is so clear that there is "no necessity for construction," and shall deem it proper in ascertaining the intention of Congress, to "look at the state of things existing" at the date of the enactment of this law, to determine the "purposes and objects of Congress in using the language" referred to, it will find that the facts certified, will demonstrate that the "*state of things existing*" when this statute was enacted will sustain the position taken by the Government, that the main purpose of Congress in its passage was, to exclude from said packages "coupons or vouchers" which are the subject of investigation under this information.

The court will observe that prior to the 4th of November, 1891, it was the practice of manufacturers of smoking tobacco to include in sealed packages many foreign articles (Record, 4) such as pocketknives, photographs, or other similar things (Record, 11); that on that date, Commissioner Mason, realized the importance of excluding such "foreign articles" from sealed packages of tobacco, that the weight provided by law should correspond with the stamp required to be placed upon the package, directed the collectors to notify the manufacturers of that ruling. This action of the Commissioner was taken without any direction from Congress. An abuse had grown up which, in his

judgment, it was necessary to correct under the implied authority that a package of tobacco means a package containing tobacco and nothing else. The circular he issued was as follows:

> Manufacturers of tobacco, in marking the gross, tare, and net weight of packages of tobacco, should include in the gross the full weight of the package and all its contents. The tare should include the weight of the pail, lining, covering, etc., so that the tare subtracted from the gross will give the net weight of the tobacco contained therein and expressed by the stamp. Great care should be exercised by the collectors to prevent foreign articles of any kind being included in any of the packages. A practice has grown up, which seems to be on the increase, by which manufacturers have included in statutory packages many foreign articles. This practice should be discontinued. A PACKAGE OF TOBACCO MEANS A PACKAGE CONTAINING TOBACCO AND NOTHING ELSE.

This circular, which at that time struck at the only evil existing, which was packing in these sealed packages knives, photographs, and similar articles, was sufficiently broad, however, in its language to exclude "coupons and vouchers." A short period after issuing this circular No. 371, Commissioner Mason modified its language, as the counsel for plaintiff in error says (Mr. Warner's brief, p. 24), by interpreting the word "article" to embrace "articles of merchandise" (Record, 11). From 1891 to the passage of this act, in 1897, the manufacturers ceased to include "articles of

merchandise" in said packages, *substituting coupons* (Record, 2–3, 9–10). This practice was permitted by the Department during six years, *there being no provision of the statute prohibiting it.* The purpose of Congress in the original enactment is further shown by its refusal to yield to the suggestion of an amendment limiting the language used in the act (Record, 8 to 13, inclusive). Four sessions of Congress have passed, since its enactment, and yet it remains undisturbed as passed in July, 1897. The construction of this statute by the Commissioner of Internal Revenue is shown by circular 106, Internal Revenue No. 477, to be in accord with the contention of the Government (Record, 6), and this action of the Department, as to its construction of the law, has never been withdrawn by it (Record, 8).

The facts agreed present to the court this condition of affairs as existing on the 24th of July, 1897, when this law was passed: First, that the only "articles or things" then included in a sealed package of smoking tobacco or cigarettes were "coupons or vouchers" similar to those set up in this information; second, that the word "article," as used in circular No. 371, issued by Commissioner Mason November 4, 1891, had been construed by the Department to prohibit the packing in said packages of tobacco "articles of merchandise;" and, third, explains the reason for the additional words used by Congress, "or things whatsoever," thus leaving the construction of the Commissioner of the word "article" to stand, and broadening his ruling to remove the abuse then existing of packing "coupons or vouchers" in the sealed packages.

The wisdom and necessities for this action of Congress is fully sustained by the agreed statement of facts contained in the record.

The question of difference, if any, between Congress and the Internal Revenue Bureau has not been, as to the *necessity* of having a law or regulations to control the *packing in* of *sealed packages* of tobacco *extraneous articles or things*, but only the *extent* to which that law or regulation should go. Should it, as provided by Congress, exclude all extraneous "articles or things whatsoever," or should it be limited, by permitting "articles or things" of inappreciable weight to be included in a sealed package of tobacco? If Congress had adopted the latter view, and not excluded all things except such as were necessary in carrying on the trade, the counsel for plaintiff in error (Mr. Russel, on p. 13, and Mr. Warner, on p. 25, of their briefs), would have admitted the constitutionality of this enactment. Congress, however, must have been of the opinion, that the *proper means* to reach the evil and protect the revenue was, not by classifying the foreign articles or things that should be included in a package, but prohibiting *all* such articles not necessary in carrying on the trade in smoking tobacco.

Commissioners Scott and Foreman who did not fully agree with Congress as to the necessity of this provision of the statute, recognized, however, its validity, and concurred in the opinion, that it was necessary to enact a law, or to promulgate a regulation, that should govern and control the subject (Record, 8, 9). Commissioner Scott, in a communication to the Secretary

of the Treasury recommended that certain regulations should be issued by the Department to regulate the use of coupons and vouchers. Under what authority he suggested these regulations we are unable to state, but that in his judgment such regulations were necessary to protect the revenue, should "coupons or vouchers" be permitted to be inclosed in such packages, there can be no doubt (Record, 9).

The difficulty of regulating this subject by law is shown by the recommendations made by the Commissioner. He recommended, first, that nothing should be contained in the package that appreciably increased the size of the package, or that weighed more than one one-thousandth of a pound; second, that no advertisements, or anything in any way in aid of any lottery or other scheme involving chance or hazard; third, anything of a pictoral nature, except manufacturers' trademarks, labels now permitted on the outside of packages, and, fourth, that the *weight of coupons should be taxed as part of the weight of the tobacco.*

This illustration of the views of the Commissioner shows, that in the opinion of the Department, there existed a necessity for the regulation of this subject, with a view of protecting the Government in the collection of its revenue. Even the manufacturers of tobacco, in their proposed circular (Record, 9, 11, 13), fully agreed with the Commissioner as to the *necessity* for a regulation of "coupons and vouchers" if permitted to be inclosed in said packages (Record, 13).

We therefore find that Congress, the Internal Revenue Bureau, and the manufacturers of smoking to-

bacco and cigarettes, all concur in the opinion, that it was necessary and proper in the public interest, and that this subject-matter should be controlled by law or administrative regulations.

The judgment of Congress, however, as shown by its enactment, was that as the article was taxed by weight, the only safe and *proper means* by which the revenue could be protected, was to exclude *all extraneous matters* except the manufacturer's wrapper, which was allowed as incident to the putting up of the tobacco in the character of packages prescribed by law.

We conclude, therefore, that Congress in passing the first paragraph of the third clause of the tenth section intended its prohibition to include the "coupons or vouchers" set forth in the information and the agreed statement of facts; that no other construction under the language of the law and the conditions surrounding the subject at the date of its enactment can be given to said paragraph.

Having presented the view of the Government, in reference to the purpose and intention of Congress to include, as within the prohibitions of the first paragraph of the third clause of the tenth section of the act of July 24, 1897, "coupons or vouchers," we will proceed to discuss the first question submitted by the certificate of the circuit court of appeals for the determination of this court:

1. "Whether the third clause of the tenth section of the act of Congress of July 24, 1897, if the prohibition of that statute be applied to the coupons described in the foregoing statement of facts, was in accordance with or in conflict with the Constitution of the United States."

The information filed by the district attorney of the United States for the district of West Virginia rests upon the following provisions of the statute:

> None of the packages of smoking tobacco and fine-cut chewing tobacco prescribed by law shall be permitted to have packed in, or attached to, or connected with them, any article or thing whatsoever, other than the manufacturer's wrappers and labels, the internal-revenue stamp and the tobacco or cigarettes, respectively, put up therein, on which tax is required to be paid under the internal-revenue laws.

A brief statement of the history of this enactment by Congress may not be inappropriate. Embodying this provision as an amendment to section 3394 of the Revised Statutes was not the result of a sudden whim or caprice upon the part of the legislature. The necessity for its enactment had been brought to its attention, and especially to the consideration of the Ways and Means Committee, first, by a joint resolution presented by Mr. Evans, and, secondly, by a bill offered by Mr. Cummings during the first session of the Fifty-fourth Congress, which joint resolution and bill, upon inspection, will be found to contain in substance similar prohibitions.

Delicate duty of the court.

In exercising the delicate constitutional duty of passing upon the validity of an act of a coordinate branch of the Government, the court can not be influenced in its action by the questions whether or not the act, in

the opinion of the judge, is one which will operate according to natural justice, nor, as stated in *Ex Parte McCardell* (7 Wallace, 574), is the "court at liberty to inquire into the motives of the legislature?" We can only examine its power under the Constitution.

> Cooley's Cons. Limitations, chap. 7, secs. 4, 5, 6.
> *Commonwealth* v. *McCloskey*, 2 Rawle, 374.
> *Fletcher* v. *Peck*, 6 Cranch, 87.
> 8 Wallace, 548.

In the latter case Chief Justice Chase uses the language:

> The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not in the courts, but to the people by whom its members are elected.

Nor can the court overlook that other important rule of constitutional interpretation, sustained so fully in all our adjudications, that it becomes the duty of the judge in construing the laws of Congress, wherever consistent with their context and language, to uphold their constitutionality.

> *Presser* v. *Illinois*, 116 U. S., 252.
> *Parsons* v. *Bedford*, 3 Pet., 433.
> *United States* v. *Coombe*, 13 Pet., 72.
> *Grenade Co.* v. *Brown*, 112 U. S., 261.

Is the third clause of the tenth section, if construed to embrace coupons or vouchers, constitutional?

It is admitted as an undisputed proposition of constitutional law, that the Government of the United States is one of enumerated and defined powers, whose

limits are prescribed and whose powers are distributed between the three coordinate departments. To the Congress has been committed, by its terms, all legislative power. When a law of Congress is assailed, we must therefore look to the National Constitution, to see if the grant of power is broad enough to embrace it. But, as stated by the Chief Justice, in *Hepburn* v. *Griswold* (8 Wallace, 613):

> It is not necessary, however, in order to prove the existence of a particular authority to show a particular and express grant. The design of the Constitution was to establish a government competent to the direction and administration of the affairs of a great nation, and, at the same time, to mark, by sufficiently definite lines, the sphere of its operations. To this end it was needful only to make express grants of general powers, coupled with a further grant of such incidental and auxiliary powers as might be required for the exercise of the powers expressly granted.

The only limitation to the exercise of the "incidental and auxiliary powers," expressed by the Constitution itself, is found in that clause which provides, the "power to make all laws necessary and proper for carrying into execution the powers expressly granted to Congress or vested by the Constitution in the Government, or any of its departments or officers."

Although, under our constitutional system, each of the coordinate branches of the Government are entirely separate and independent of the other, yet it has frequently been necessary for the judicial department

to review the action of the Congress, as its action affected the right of the citizen, and, if repugnant, to declare that action in conflict with the grant of power. This has never been done, however, in doubtful cases, or unless upon clear and strong convictions upon the part of the courts, that the act was beyond the powers conferred. Even then it has been done with great reluctance. As stated by Chief Justice Marshall, in the case of *Fletcher* v. *Peck* (6 Cranch, 128):

> The question, whether a law be void for its repugnancy to the Constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. * * * The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

And Justice Strong, in announcing the opinion in the *Legal Tender Cases* (12 Wallace, 531), approving the quotation just given, adds:

> It is incumbent, therefore, upon those who affirm the unconstitutionality of an act of Congress to show clearly that it is in violation of the provisions of the Constitution. It is not sufficient for them that they succeed in raising a doubt.

The same view has been taken by Chief Justice Chase, in the well-considered opinion of *Veazie Bank* v. *Fenno* (8 Wallace, 548), where, in discussing the tax of 10 per cent on State banks, he answers this question: "Is the tax so excessive as to indicate the

purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, unconstitutional?" He replies:

> The first answer to this is that the judicial can not prescribe to the legislative departments of the Government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not in the courts, but to the people by whom its members are elected.

All the decisions of the Supreme Court, when treating of the duty of the judiciary, in considering the constitutionality of an act of Congress, rest their reasoning upon the application of the principle announced by Chief Justice Marshall in the case of *McCulloch* v. *State of Maryland* (4 Wheaton, 423), from an examination of which it is easy to see that in the discussion of the subject he had in mind both the express grants as well as the "incidental and auxiliary" grants of power:

> Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the Government, to undertake here to inquire into *the degree of its necessity*, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power.

and (4 Wheaton, 421):

> Let the *end* be legitimate, and within the scope of the Constitution, and all *means* which

> are appropriate, which are plainly adapted to that end, and which are not prohibited.

may constitutionally be employed to carry it into effect.

This latter quotation is but a different way of stating the same proposition by the same distinguished judge, as found in the case of *United States* v. *Fisher* (2d Cranch, 396), in which he says:

> Any means which are in fact conducive to the exercise of a power granted by the Constitution.

and again in the case of *McCulloch* v. *The State of Maryland*, he enlarges the language made in the quotation from that case by using the language, "*any means calculated to produce the end.*"

No clearer announcement of this principle has been made than that found in the civil rights case (p. 51, 109 U. S.) by Justice Harlan:

> But it is for Congress, not the judiciary, to say that legislation is appropriate—that is, best adapted to the end to be obtained. The judiciary may not, with safety to our institutions, enter the domain of legislative discretion and dictate the means which Congress shall employ in the exercise of its granted powers. That would be sheer usurpation of the functions of a coordinate department, which, if often repeated and permanently acquiesced in, would work a radical change in our system of government.

This but reiterates in different language the doctrine as declared by Marshall in 4 Wheaton, 421, in which he says:

> The sound construction of the Constitution must allow to the national legislature *that discretion*, with respect to *the means by which the powers which it confers are to be carried into execution*, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people.

This principle was further approved by the court in its exact language (12 Wallace, 539), and the court in that case concluded the discussion of the principles that would affect the constitutionality of the act, and of its duty under such circumstances, in the following language:

> Before we hold the legal-tender act unconstitutional, we must be convinced that they were not appropriate means or means conducive to the execution of any or all of the powers of Congress, or of the Government, not appropriate in any degree (*for we are not judges of the degree of appropriateness*), or we must hold that they were prohibited.

This extract from the opinion of the court in the legal-tender cases is but a reaffirmation found in the case of *Hepburn* v. *Griswold* (8 Wallace, 615), in which the court in construing the language found in the Constitution, "All laws necessary and proper for carrying into execution," uses this emphatic language:

> It must be taken, then, as finally settled, so far as judicial decisions can settle anything, that

> the words 'all laws necessary and proper for carrying into execution' powers expressly granted or vested have, in the Constitution, a sense equivalent to the words, laws *not absolutely necessary indeed*, but appropriate, plainly adapted to constitutional and legitimate ends; laws not prohibited, but consistent with the letter and spirit of the Constitution; laws really calculated to effect the objects intrusted to the Government.

In the opinion delivered by Justice Peckham (173 U. S., p. 314):

> It is always an exceedingly grave and delicate duty to decide upon the constitutionality of an act of the Congress of the United States. The presumption, as has frequently been said, is in favor of the validity of the act, and it is only when the question is free from any reasonable doubt that the court should hold an act of the law-making power of the nation to be in violation of that fundamental instrument upon which all the powers of the Government rest. This is particularly *true of a revenue act of Congress.* The provisions of such an act should not be lightly or inadvisedly set aside, although they be plainly antagonistic to the Constitution it is the duty of the court to so declare. The power to tax is the one great power upon which the whole national fabric is based. It is as necessary to the existence and prosperity of a nation as is the air which he breathes to the natural man. It is not only the power to destroy, but it is also the power to keep alive.

And further, on page 524, he says:

> Instead of a memorandum, Congress might have required a sworn report, with the proper amount of stamps thereon, to be made at certain regular intervals, of all sales made subject to the tax. *Other means might have been resorted to for the same purpose. Whether the means adopted were the best and most convenient to accomplish that purpose was a question for the judgment of Congress, and its decisions must be conclusive in that respect.*
>
> The means actually adopted do not legally interfere with or obstruct the internal commerce of the States, nor are such means a restraint upon that commerce so far as to render the means adopted illegal. That Congress might have adopted *some other means of collecting the tax which would prove less troublesome or annoying to the taxpayer can surely be no reason for holding that the method set forth in the act renders the tax invalid.* As it has the power to impose the tax, *the means to be adopted for its collection within reasonable and rational limits must be a question for Congress alone.*

Principles applied to the facts of the case.

In considering these authorities and applying the principles which they lay down, the court should remember that in the 3362 section of the Revised Statutes as amended, all smoking tobacco is required to be put up and prepared "*in packages containing 2, 4, 8, and 16 ounces each;*" that by an amendment in the war-revenue law of 1898 the packages were reduced in weight to

$1\frac{3}{3}$, $2\frac{1}{2}$, $3\frac{1}{3}$, and a new provision made for a 1-ounce package. That smoking tobacco is taxed by package according to its weight, and that the stamp of the Government is evidence of the weight of the tobacco—not the weight of the package, but *the weight of the tobacco contained in it.* Had the Government the right, in the administration of this law and for its efficient enforcement, to prevent any article from being inclosed within a sealed package, which would have increased the weight of the package containing the taxable subject? Had it the right to provide that no article of greater weight than one-tenth of an ounce, or of any other weight, should be inclosed within the sealed package? If it had the right to legislate against increasing the weight of the contents of a package, so as to exclude articles of a given weight being packed therein, can there be a question that it had the right to exclude all substances, except that which was the subject of taxation from being placed therein?

If the Government was under the necessity, in sustaining the constitutional power of Congress to enact this provision, to rely upon the "incidental and auxiliary powers" found in the Constitution, and not upon an express grant of power, it seems to us, we should have little difficulty in convincing the court that the question presented by this record is not one of *power*, but one of *policy* or *expediency.* To declare this law unconstitutional, the court must hold that it was not "necessary or proper" in carrying into execution *any grant of power* to Congress. It must be prepared to say that the "means" employed by Congress were not

"*adapted to the end*" which Congress had in view, the efficient administration of a constitutional impost; that the "means" adopted were not "means calculated to produce the end," to wit, *the true weight of the subject of taxation.*

The personal opinion of the individual composing the court, as to its appropriateness to accomplish the purpose of Congress, can not be substituted for the express judgment of Congress.

Congress has the right to select the means.

Is the court prepared to say, in the language of Marshall, that it "feels a clear and strong conviction" that as an administrative measure it was not within the power of Congress to *consider this means*, among others, to enforce the *correct weight of the contents of the subject to be taxed contained within the sealed packages? Weight*, and that alone, is the basis on which the *tax* of the Government is determined. Has it not the right to guarantee the correctness of this basis? Is the court prepared to say that the method adopted by Congress should not have been considered by it as a "means calculated to produce the end"—to prevent the fraudulent underweight of the subject of taxation contained in these sealed packages—and therefore it is repugnant to the Constitution? If the court can not hold that the "means" adopted by Congress as an administrative measure to effectuate the exercise of a constitutional power, *was not excluded from its consideration*, it must admit the right of Congress to *select this means* for the enforcement of the exercise of a

constitutional power. Within this limitation the legislature is certainly supreme. It is, then, not a question of *power*, but, as I have stated, of *selection*, of *policy*, of *expediency*. To urge the courts to enter this field is to request that it shall do that which so early in our history was repudiated by Chief Justice Marshall when he stated that it would be to "pass the line which circumscribes the judicial department and tread on legislative ground."

As decided by Justice Peckham (173 U. S., p. 524):

> Instead of a memorandum, Congress might have required a sworn report, with the proper amount of stamps thereon, to be made at certain regular intervals, of all sales made subject to the tax. Other means might have been resorted to for the same purpose. Whether the means adopted were the best and most convenient to accomplish that purpose was a question for the judgment of Congress, and its decisions must be conclusive in that respect.
>
> The means actually adopted do not legally interfere with or obstruct the internal commerce of the States, nor are such means a restraint upon that commerce so far as to render the means adopted illegal. That Congress might have adopted some other means of collecting the tax which would prove less troublesome or annoying to the taxpayer can surely be no reason for holding that the method set forth in the act renders the tax invalid. As it has the power to impose the tax, the means to be adopted for its collection within reasonable and rational limits must be a question for Congress alone.

The object and purpose of the act.

The "*purpose and end*" of this statute is to raise revenue for the support of the National Government by imposing a tax upon smoking and other tobacco, and to provide such regulations as in the judgment of Congress will protect the revenue and enforce the collection of the taxes levied. This being the object, the power of Congress is found in the first article, section 8, of the Constitution, which provides: "The Congress shall have the power to lay and collect taxes, duties, imposts, and excises." This is an express grant of power. There is no limitation upon this grant of power that can affect the case at bar, nor is there any question raised by the defendant as to the right of Congress to tax the contents of these packages. The sole and only defense offered is, that in providing the regulations for the enforcement of this grant of power, Congress has employed "means" which, in the judgment of the defendant, are repugnant to the Constitution. But, as Chief Justice Chase said in the case of *Hepburn* v. *Griswold*, that in carrying out the powers conferred upon Congress it did not depend upon whether the law was "*absolutely necessary, but appropriate*," and "*not prohibited*," but a law really calculated to effect the object intrusted to the Government.

Chief Justice Fuller, in the case of *In re Kollock* (165 U. S., pp. 536, 537), said:

> The act before us is on its face an act for levying taxes, and although it may operate in so doing to prevent deception in the sale of

oleomargarine as and for butter, its primary object must be assumed to be the raising of revenue. And considered as a *revenue act* the designation of the stamps, marks, and brands is merely in the discharge of an administrative function and falls within the numerous instances of regulations needful to the operation of the machinery of particular laws, authority to make which has always been recognized as within the competency of the legislative power to confer.

Protection to purchasers in respect of getting the real and not the spurious article can not be held to be the primary object in either instance, and the identification of dealer, substance, *quantity*, etc., by marking and branding must be *regarded as means to effectuate the objects of the act in respect of revenue.*

Illustrations of the necessity, in the judgment of Congress, for stringent regulations similar to those enacted in the first paragraph of the third clause of the tenth section of the act of 1897, made with the object of facilitating the collection of the tax imposed, and to prevent frauds upon the revenue.

By an examination of the questions hereinafter referred to, the court will realize at once that the enactment of the law under discussion was not a departure in revenue legislation. It will be found to follow in the beaten track that has been marked by many similar statutes:

Act of August 27, 1894, section 68; the following sections of the Revised Code; sections 3362, 3363, 3364, 3381, 3384, 3387, 3392.

An act passed by Congress after the fullest discussion found in the 29th Statutes at Large, 604, entitled "An act to allow the bottling of distilled spirits in bond," illustrates the case at bar, and the views which Congress had of its power over these taxable subjects. The prohibitions found in that act are equally as effective as those found in the tenth section.

Some adjudicated cases.

The Revised Statutes require that before any package of either liquor, cigars, chewing or smoking tobacco are sold there shall be placed upon them the stamp provided by law. In the case of *United States* v. *Keys* (10 Fed. Rep., 876), the court held that the payment of that tax without putting the stamp upon the package was not a compliance with the law, and in discussing the statute used this language:

> The Government has imposed a tax on all kinds of manufactured tobacco, even refuse, scraps, and sweepings; *having required it to be put up in a particular way or ways*, and to be stamped with stamps for the payment of the tax, and the stamps canceled; and have imposed this penalty, not for having in possession manufactured tobacco on which the tax had been paid, but manufactured tobacco on which stamps have not been placed and canceled. Congress has as much power to say the tax shall be paid in a particular way—that is—as it has to impose any tax, *and all its requirements* in that behalf *must be complied with.*

In the case of *United States* v. *Jacobi* (12 Blatch., 491),

the court, in passing upon section 3397 Revised Statutes, which prohibits the putting on of any "stamp in the similitude or likeness of any other stamp required to be used, * * * whether the same be a custom or internal-revenue stamp," held that the indictment for this offense did not involve the question whether the tax was paid or not, but the question of fraud upon the public.

Justice Caldwell, in delivering the opinion in the case of *United States* v. *133 Packages of Spiritous Liquors and Wines* (22 C. C. A., 228), in passing upon section 3449 Revised Statutes, "prohibiting the shipment, transferring, or receiving of liquors or wines under any than the *proper name* or *brand known to the trade* as designating the *kind* or *quality* of the contents of the packages," said:

> The contention of the learned counsel for the claimant, that this section is nothing but a trade-mark regulation, is not tenable. It is one of the numerous regulations prescribed by the internal revenue law, intended to prevent frauds on the revenue in the manufacture, removal, shipment, and sale of distilled spirits and other liquors, and to aid in the detection of such frauds. The regulations for this purpose are very extensive and extremely minute. They embrace every step in connection with the manufacture and handling of spirits, from the introduction of the raw material into the distillery down to the rectification of the product and its removal, shipment, and sale. * * * Before any court would be authorized to hold

an act of Congress obsolete and inoperative it would have to appear conclusively that it was totally *inoperative for any lawful or useful purpose. When the statute relates to a subject-matter within the constitutional competency of Congress to legislate upon, the presumption is that it serves a useful purpose.* When a statute is susceptible of two constructions, one which would render it valid and operative, and the other to press it beyond the constitutional competency of Congress to enact, or render it inoperative, the former construction will be adopted. The section is *none the less a revenue regulation* because its enforcement may *tend to discourage the piracy of trade-marks, and prevent frauds upon those who consume the contents of the packages. These are mere incidents of the statute and not its primary object.* Congress has an undoubted right to legislate to prevent frauds upon the public revenue, and the validity of such legislation is not affected by the fact that it incidentally tends to the discovery or suppression of private frauds.

Should the court sustain the principle upon which rests the contention of the plaintiff in error, its decision would tend to render uncertain and doubtful many of the provisions of the custom and internal-revenue laws which are regarded as necessary in the collection of the revenue.

After a full review of the authorities to which I have referred, bearing on the constitutionality of an act of Congress, the object of which is to put in force and give effect to an express grant of power, and applying the well-recognized rules of constitutional interpretation

as to what are "proper and necessary laws" which, as stated by Marshall, is the exercise of discretionary power by Congress in the employment "of means not prohibited, but which are really calculated to effect the objects intrusted to the Government," we can not perceive how the law, now under consideration, could be other than valid. Under our complicated system of internal taxation, the rights of the third party would be most seriously affected unless Congress was at liberty to make stringent provisions for their administration and enforce strict compliance with the same. All similar provisions, when submitted to the test of judicial criticism, have been upheld. Should the contention of the plaintiff in error be sustained in this cause, the principle upon which the court's decision must rest would necessarily throw into chaos and confusion the administration of both the internal-revenue and the custom laws of the country. We are at a loss to perceive upon what theory the court would base a decision that this clause of the tenth section of the act of July 24, 1897, was unconstitutional and void.

Packages of smoking tobacco, under the law of Congress, are taxed by weight, and the stamp of the Government is intended, and, in fact, does, in the mind of the public, fix and determine that question. Being sealed, to allow extraneous substances, of whatever character, to be included within the package, and thus by negligence or fraud reduce the weight of the contents, would make the Government a *particeps criminis* in the fraud perpetrated upon the public. Having a

right to tax the subject-matter; having the right to prescribe the size and weight of contents; having the right to provide that no sale shall be made except in original and full packages, as put up under the provisions of law; having the right, as decided in the case of *In re Rapier* (143 U. S., 110), to prevent the facilities furnished by any of its departments from being used for improper purposes, can there be any question in the mind of the court that the prohibition contained in the first part of the third clause of the tenth section is a constitutional exercise of the powers conferred upon the Congress, and is, therefore, valid?

The illustrations which we have given show, that when the Government has once taken possession of a subject for the purpose of exercising its grant of power to tax the same, that its policy, as manifested by its enactments, has been, first, to execute its powers of taxation; second, to guard against frauds upon the revenue, and third, to prevent any possibility of its being made a participant in a fraud upon the public through the use of the "means" which it has found necessary to employ in carrying out those powers.

The third question asked of your honorable court is:

3. Upon the facts stated, was the seizure set forth in the information of the packages of Merry World tobacco therein described, or was the judgment of forfeiture rendered in this case justified under section 3453 of the Revised Statutes?

In answer to this question the Government would submit:

1. That the agreement of counsel removed this question from the consideration of the court below;

2. That under the proceedings in the case, the question of seizure could not have been considered by the court below and will not be by this court;

3. That section 3453 denounced against the offense the penalty of forfeiture; and

4. That the seizure was properly made under said section.

First. That the agreement of counsel removed this question from the consideration of the court below.

The following consent agreement was entered in this case of the 1st day of July, 1899:

> And the said district attorney and the said claimant, by his counsel, respectively, waive any and all informalities and omissions, should any such be found in these proceedings on either side.

The Government had been liberal with those who had been violating this law, anxious not to enforce its penalty until its validity and extent was passed upon by the judicial department of the Government. For that reason it did not seek to seize all of the tobacco that was forfeited by reason of this statute, but selected a manufacturer who had a small amount, that a test case could be made with as little inconvenience to the citizen as possible. We have understood that for this reason this consent order was entered; that the merits of the case could, without legal quibble or technical reliance, be brought before the court for its consideration and judgment.

Second. That under the proceedings in this case, the question of seizure could not have been considered by the court below and will not be by this court.

This was a proceeding *in rem*, to subject to forfeiture the property, the subject of taxation, which had been packed in fraud of the provisions of the internal-revenue law.

As decided by Justice Swain, in the case of *Cliquot's Champagne* (3 Wallace, 145):

> Revenue laws are not penal laws in the sense that requires them to be construed with great strictness in favor of the defendant. They are rather to be regarded as remedial in their character, and intended to prevent fraud, suppress public wrong, and promote the public good. They should be so construed as to carry out the intention of the legislature in passing them and most effectually accomplish these objects.

Justice Story, discussing a similar statute, in the case of *Wood* v. *The United States* (16 Peters, 359), after approving the instructions of the district judge, "that no question in relation to the mere seizure of the goods is in issue, or material under the pleadings in this case," proceeds to observe:

> It is of no consequence whatsoever what were the original grounds of seizure, whether they were well founded or not, if, in point of fact, the goods are by law subject *to forfeiture;* for the the United States are not bound by the acts of the seizors to the causes which influenced them in making the seizure, nor by any irregularity

on their part in conducting it, if, in point of fact, the seizure can now be maintained, as founded upon an *actual forfeiture thereof at the time of seizure.*

Third. That section 3453 denounced against the offense the penalty of forfeiture; and

Fourth. That the seizure was properly made under said section.

We will discuss the third and fourth propositions together, as they involve the construction of the same statute. It is as follows:

> All goods, wares, merchandise, articles, or objects, on which taxes are imposed, which shall be found in the *possession or custody*, or within the *control* of any person for the purpose of being *sold or removed by him in fraud of the internal-revenue laws*, or with design to avoid payment of said taxes, may be *seized* by the *collector* or *deputy collector of the proper district* or by *such other collector or deputy collector* as may be *specially authorized by the Commissioner of Internal Revenue* for that purpose, and shall be forfeited to the United States. The proceedings to enforce such forfeitures shall be in the nature of a proceeding *in rem* in the circuit court or district court of the United States for the district where such seizure is made.

The facts, as shown in the case agreed, are that these packages containing the "coupons or vouchers" were packed by the Merry World Tobacco Company, of Wheeling, W. Va., in the "manufactory and pre-

pared for sale;" that the promise was made that the purchaser had bought a definite share in any of the articles mentioned on the voucher (Record, 2); that Emanuel Felsenheld claimed the ownership of said tobacco which had been seized.

These facts being established, there was shown upon the part of the United States, if the first paragraph of the third clause of the tenth section is constitutional, *probable cause* for the present prosecution, and Judge Story, in deciding the case of *Wood* v. *The United States* (16 Peters, 366), observes that—

> probable cause must, in this connection, mean reasonable ground or presumption that the charge is, or may be, well founded.

If, therefore, the plaintiff in error relied upon any defense, in reference either to forfeiture or seizure of these goods, the burden of proof was upon him This view is fully sustained in *Cliquot's Champagne* (3 Wallace, 343–344), the court closing the discussion of the question of the *onus probandi* with the following remarks:

> The applicability of the rule alike in cases arising under all the revenue laws was assumed by the eminent counsel concerned and by the court. * * * This tacit recognition is equivalent to an express declaration.

In the case of the *United States* v. *580 Barrels of Distilled Spirits* (5 Blatch., 410), the court, in discussing this question, says:

> We are inclined to think that upon the seizure of the goods for an alleged violation of law,

> if the complainant relies upon a conformity with it as a defense, he is bound to establish the affirmative by proof; that it would be unreasonable and not consistent with the rules of evidence to call on the Government to establish a negative. The means of furnishing the evidence are in the possession of the claimant. * * * The adoption of the seizure by the Government cures any defect in this respect.

If the contention of the Government is correct, that the Congress had the right to prohibit, under the penalty of seizure and forfeiture, the packing in these packages of tobacco the "coupons or vouchers" set out in the information; that in the exercise of that constitutional power, the Congress expressed its judgment by this enactment; that the packages of tobacco put up in *fraud of the revenue law* were in *possession* or *custody* or within the *control* of any person; that they were not claimed by the Merry World Tobacco Company, but by one Emanuel Felsenheld, the conclusion under the decisions as to the *onus probandi* rests upon the defendant, the facts agreed were sufficient to show that they were removed in fraud of the internal-revenue law, and the right of seizure and forfeiture, under section 3453 of the Revised Statutes, can not be questioned.

4. Upon the facts stated, was the seizure set forth in the information of the packages of Merry World tobacco therein described, or was the judgment of forfeiture rendered in this case justified under section 3456 of the Revised Statutes?

If for any reason that might be suggested to the mind of the court, the seizure and forfeiture of this property is not valid under section 3453, which we

have discussed, can there be a doubt of the forfeiture of the property under section 3456 of the Revised Statutes and the right to seize such forfeited property, under section 3166 and 3460 of the Revised Statutes. Why the circuit court of appeals should have limited the question as to *seizure* (if such is the true construction of its language) to section 3456, which provides for the *forfeiture* when the right of seizure is sustained by other sections referred to, we are at a loss to understand. Nor can we see the relevancy of the request for an answer, from this honorable court, as to the question of seizure under the decisions hereinbefore referred to of *Wood* v. *The United States* (16 Peters, 359), and *United States* v. *508 Barrels of Distilled Liquor* (3 Blatch., 410), as under these decisions, the court, acting by consent in lieu of a jury, could not have been called on to pass upon the question of *seizure*.

Clause 3 of paragraph 10 of the act of 1897 provides no penalty for its violation. This frequently occurs in the legislation of Congress, but it has seldom given rise to any difficulty as there have been found general provisions to meet such omissions. The penalty in this case would have been determined by section 3363 of the Revised Statutes but for the limitation contained in that section. It provides:

> No manufactured tobacco shall be sold or offered for sale *unless put up in packages* and stamped as *prescribed by law*.

The limitation found in the latter part of the section, however, limits the penalty to offenses of violations of

the provision found in *chapter 6* of title "35, internal revenue." The amendment made in the act of 1897 (now spoken of as the third clause of the tenth section) amends section 3394 of the Revised Statutes found in "title 35, internal revenue, chapter 7." For this reason the Government has relied upon the penalty of forfeiture as coming within the spirit and language of section 3456, which imposes a penalty for doing *anything by this title prohibited*, which language embraces all violations of the provisions of the statute included within the "*title 35, internal revenue.*" It provides as follows:

> If any distiller, rectifier, wholesale liquor dealer, or manufacturer of tobacco or cigars shall knowingly or willfully omit, neglect, or refuse to do or cause to be done any of the things required by law in the carrying on or conducting of his business, or shall do anything by *this title* prohibited, if there be no specific penalty or punishment imposed by any other section of this title for the neglecting, omitting, or refusing to do or causing to be done the thing required or prohibited, he shall pay a penalty of one thousand dollars; and if the person so offending be a distiller, rectifier, or wholesale liquor dealer, all distilled spirits or liquors owned by him or in which he has an interest as owner, and if he be a manufacturer of tobacco or cigars, all tobacco or cigars found in his manufactory, shall be forfeited to the United States.

The agreed statement of facts shows that these "coupons or vouchers" were packed in each of the

packages seized "when it was packed in the manufactory and prepared for sale" (Record, 2); that it had been the practice and custom of manufacturers of smoking tobacco to include such coupons in said packages (Record, 2, 3); that there had been "frequent complaints made to the Government by private persons or corporations who were interested in the *discontinuance by the defendant* and others of the use of said coupons" (Record, 15); that "because of the insistence by private persons or corporations who were interested in the *continuance by the defendant and others of the use of said coupons*" this seizure of property and information was made (Record, 15); that the defendant claimed to be the owner of the tobacco seized (Record, 1); that the collector was *specially authorized* by the Commissioner of Internal Revenue to seize the articles or things mentioned in the information.

It needs no argument to show that, under the law, no one but a manufacturer could pack within these sealed packages the coupons set out in the information; nor could interested parties desire the "*discontinuance by the defendant* of the use of said coupons" unless he was a manufacturer; nor could other persons or corporations be interested in the continuance by the "*defendant in the use of the coupons*" unless he was the manufacturer of the tobacco seized.

The facts admitted in the case agreed bring the case clearly within section 3456, which declares the penalty of forfeiture of this tobacco. The property being forfeited, the right to seize the same is found in sections 3166 and 3460 of the Revised Statutes.

The principle decided in the case of *United States* v. *Two Hundred Barrels of Whisky* (95 U. S., 571), in which the court was passing upon a similar statute enacted in 1868, will be found to govern and control the penalties for a violation of section 3394, as amended by the third clause of the tenth section of the act of 1897. Chief Justice Waite, in delivering the opinion of the court, on page 574, in speaking of what was then section 96 of the act above referred to, said:

> Section 96 was, however, undoubtedly intended to impose upon rectifiers and wholesale liquor dealers the duty of doing, or causing to be done, everything pertaining to their respective occupation which was necessary, in order to enable others acting under the law to do what was required of them. If they failed in this, and there was no other penalty provided for the neglect, they were subjected to the provisions of that section. If, however, by any other section a specific duty was imposed upon them, which, if performed, would enable the other parties to act in the proper manner, and a penalty was prescribed for the omission to perform such duty, they were not to be proceeded against under section 96. It was not intended by Congress to add, in that section, to the already existing penalties for an offense, but to provide for omitted cases only.

The court in the case cited, clearly announces the principle which should control in the case now before the court: That where no specific penalty is prescribed for the doing or the omission to do a particular thing,

the punishment should be controlled by the general provision. In this case Congress has affixed no specific penalty for the violation of section 10. Section 3363, we believe, can not be relied upon, as the offense is not included in the sixth chapter of the thirty-fifth title. Section 3456, found under the head of title 35, internal revenue, embraces in its scope section 3394, as amended by the tenth section of act of 1897, it being part of said "title."

The evidence hereinbefore referred to certainly presents a case of probable cause, and sufficient on which to rest the judgment of the court if not contradicted by any evidence in the record. And if such evidence existed it was the duty of the plaintiff in error to present it to the court below. This has not been done.

Wood v. *The United States*, 16 Peters, 336;
Cliquot's Champagne, 3 Wallace, 143, 4;
United States v. *508 Barrels Distilled Spirits*, 5 Blatch., 410.

JAMES M. BECK,
Assistant Attorney-General.
CHARLES J. FAULKNER,
Special Counsel for Government.

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Supreme Court of the United States.

No. 205.—October Term, 1901.

Emanuel Felsenheld, Claimant of 288 Packages of Merry World Tobacco, Plaintiff in Error, vs. The United States.

On a certificate from the United States Circuit Court of Appeals for the Fourth Circuit.

[May 19, 1902.]

This was a proceeding commenced in the Circuit Court of the United States for the District of West Virginia, seeking a forfeiture of certain tobacco. Attachment and monition were duly issued. The case was submitted upon an agreed statement of facts, and a judgment of forfeiture was entered. Whereupon the case was taken on error to the Circuit Court of Appeals for the Fourth Circuit, which certified four questions.

The facts as found in the agreed statement are these: At times a practice prevailed among manufacturers of tobacco of placing in their packages of tobacco other articles of intrinsic value, such as penknives, &c. On November 4, 1891, the Commissioner of Internal Revenue issued this circular:

"Manufacturers of tobacco, in marking the gross, tare and net weight of packages of tobacco, should include in the gross the full weight of the package and all its contents. The tare should include the weight of the pail, lining, covering, &c., so that the tare subtracted from the gross will give the net weight of the tobacco contained therein and expressed by the stamp. Great care should be exercised by the collectors to prevent foreign articles of any kind being included in any of the packages. A practice has grown up, which seems to be on the increase, by which manufacturers have included in statutory packages many foreign articles. This practice should be discontinued. A package of tobacco means a package containing tobacco and nothing else."

On July 24, 1897, Congress passed what is known as the Dingley Bill. (30 Stat. 151.) The third clause of the tenth section thereof amended section 3394 of the Revised Statutes so as to read:

"None of the packages of smoking tobacco or fine-cut chewing tobacco and cigarettes prescribed by law shall be permitted to have packed in, or attached to, or connected with them any article or thing whatsoever, other than the manufacturers' wrappers and labels, the internal revenue stamp and the tobacco or cigarettes, respectively, put up therein, on which tax is required to be paid under the internal revenue laws; nor shall there be affixed to, or branded, stamped, marked, written or printed upon said packages or their contents any promise or offer of, or any order or certificate for, any gift, prize, premium, payment or reward."

On the 23d day of September, in the year 1898, at the city of Wheeling, in the district aforesaid, the internal revenue collector of the United States seized 1,440 packages of chewing and smoking tobacco known by the name and brand of Merry World tobacco, weighing one and two-thirds ounces to the package, and having a total weight of 150 pounds, and afterwards, on the 5th day of April, in the year 1899, J. K. Thompson, the marshal of the United States for the said district of West Virginia, in pursuance of the attachment and monition appearing in the record, took into his possession the said 1,440 packages of tobacco, and now holds the same in his possession.

At the time of the seizure by the collector there was in each of the packages a small slip of paper called a coupon, with printed words and figures on both sides thereof, which coupon had been placed within such package at the time when it was packed in the manufactory and prepared for sale. These coupons were all alike, and on each of them were the following words and figures, that is to say, upon one side thereof the following words and figures:

"*Merry World Tobacco Coupon.*

"With the tobacco packed herewith the purchaser has bought a definite share in any of the articles mentioned on the other side of this voucher.

"We will send you postpaid any or all of the articles listed on the other side for the number of coupons as stated.

"Mail these coupons to the Merry World Tobacco Co., Wheeling, W. Va., stating number of coupons sent, articles wanted, your name, street and number, city or town, county and State."

And on the other side the following words and figures:

"Will send you postpaid for 20 coupons, 1 picture, 14 x 28, handsome water-color fac-simile, 12 subjects.

"30 coupons, 1 picture, 20 x 24, fine pastel fac-simile, 12 subjects.

"40 coupons, 1 picture, 20 x 30, beautiful Venetian scenes, 4 subjects.

"50 coupons, 1 picture, 22 x 28, elegant water-color gravures, 2 subjects.

"60 coupons, 1 picture, 22 x 28, magnificent water-color gravures, 4 subjects.

"No advertising or lettering on any of the above. Such excellent works of art have never before been offered, except through dealers, at very high prices. They are suitable decorations for the most elegant home, and to be appreciated must be seen. See descriptive catalogue mailed on application. Order by subjects.

"20 coupons, 1 book of Popular Seaside Library, 300 titles by favorite authors.

"50 coupons, 1 cloth-bund book, 160 titles by eminent authors. Catalogues of our books mailed on application.

"25 coupons, 1 scarf-pin solid sterling silver.

"25 coupons, 1 pipe, genuine French briar.

"40 coupons, 1 rubber tobacco pouch, self-closing.

"75 coupons, 1 elegant pocketbook, finest quality leather, gent's or ladies'.

"70 coupons, 1 pocket-knife, first quality, American manufacture, razor steel hand-forged, finely tempered blades. Stag handle. Your choice between jack-knife or pen-knife.

"95 coupons, 1 fine razor, highest grade steel, hollow ground.

"40 coupons, 1 bicycle lock, nickeled, gent's sprocket or lady's with chain.

"150 coupons, 1 cyclometer, 1,000 miles repeating. In ordering state size of wheel.

"550 coupons, 1 excellent open-face watch. Guaranteed without qualification. Has all improvements up to date. It will wear and perform well for a lifetime if only ordinarily cared for.

"Illustrated catalogue for the above mailed upon application."

This coupon is printed on thin paper, is of inappreciable weight, is without any intrinsic value in itself, and has upon it no picture of any kind and does not affect, in any way, the ascertaining of the proper tax payable upon the package or interfere in any way with the collection of such tax. The value of the five cases of tobacco of 288 packages each is and was when they were seized as aforesaid fifty-four dollars ($54.00). The packages were owned by Emanuel Felsenheld, who at the proper time intervened and claimed the property.

The following are the questions certified by the Court of Appeals:

"First. Whether the third clause of the tenth section of the act of Congress of July 24, 1897, if the prohibition of that statute be applied to the coupons described in the foregoing statement of facts, was in accordance with or in conflict with the Constitution of the United States?

"Second. Whether, if the said section be properly construed, the coupons described in the foregoing statement of facts are within its prohibition?

"Third. Upon the facts stated, was the seizure set forth in the information of the packages of Merry World tobacco therein described, or was the judgment of forfeiture rendered in this case justified under section 3453 of the Revised Statutes?

"Fourth. Upon the facts stated, was the seizure set forth in the information of the packages of Merry World tobacco therein described or was the judgment of forfeiture rendered in this case justified under section 3456 of the Revised Statutes?"

Mr. Justice BREWER delivered the opinion of the Court.

The first two questions may be considered together. There can be no doubt that the coupon comes within the letter of the statute. That prohibits packing in, attaching to or connecting with the package "any article or thing whatsoever" other than certain specified labels and stamps. If Congress intended excluding from the package absolutely everything not named, it used the words to express that intent, and could not have used any more strongly indicative of it. "Any article or thing whatsoever" is a descriptive clause as broad and comprehensive as could be selected, and since that clause is used, followed by an express exception, the coupon must come

within the exception or else it falls within the comprehensive clause. The debatable question arises upon the fact stated in the agreement that the coupon is printed on thin paper of inappreciable weight, without intrinsic value, and does not affect in any way the ascertaining of the proper tax payable upon the package, or interfere in any way with the collection of such tax. There seems to have been a discussion in the internal revenue department whether Congress could rightfully prevent the insertion in the package of an article whose presence in no way affected the collection of the internal revenue tax, and therefore on the theory that Congress could not have intended an unconstitutional provision, whether the act should be construed as including such an article.

In the internal revenue legislation Congress has not simply prescribed that certain articles shall pay a tax, but has provided a series of rules and regulations for the manufacture and sale of such articles, including therein directions as to the size and form of packages, and such other matters as in its best judgment were necessary or advisable for the purposes of effectually securing the payment of the tax imposed. Now the contention is that the courts may supervise this system of rules and regulations, and if they find a provision which, in their judgment, in no way secures or facilitates the proper collection of the tax they may strike it down as something beyond the power of Congress. It is said that the only matter in which the national government is concerned is the tax; that it is in no manner responsible for what goes into the commercial world covered by its stamp; that it has no police power, no duty of caring for the health or safety of citizens or others who buy articles upon which its stamp is placed; that it does not guarantee either quantity or quality, and, in short, that its power is limited to such provisions as are essential or helpful in the collection of the tax.

It may be conceded that the goverment's stamp is not a guaranty of quantity or quality, and that no responsibility attaches to it, although the manufacturer puts into the packages less than the specified quantity of goods or goods of inferior quality. But does it follow that the government has no power to prescribe that the packages which it stamps, upon which it collects a tax, shall contain the very articles and only the articles which it purports to tax and which its stamp certifies that it has taxed? Take the matter of tobacco; can it be that a manufacturer may fill packages purporting to be of tobacco with half tobacco and half sawdust, and the government can pass no valid statute to prevent it? If the manufacturer is willing to pay a full tobacco tax on this package, half tobacco and half sawdust, must the government take the money, affix its stamp, and thus in effect certify that the contents are that which it has imposed a tax upon? Manufactured goods are not necessarily sold in this country, but may be shipped to other countries and sold there, and can it be

that the stamp of this government is absolutely worthless as an assurance that that which is within the package is the article which the government purports to have taxed? It is one thing to say that the government's stamp is not a guaranty of either quantity or quality, and that no liability attaches to it if the manufacturer imposes upon his customers by inserting something which is not that which is stamped, but it is a very different thing to hold that the government is absolutely powerless to legislate so as to protect the customer and prevent the manufacturer from putting within the package anything but the article which it proposes to tax. Whatever courts may rule as to the constitutional limits of the power of Congress the great majority of people here and elsewhere will believe in and rely upon the truthfulness of a certificate made by the government, and will be shocked to be told that it means nothing to them, but only money to the government.

It seems to us that, in the rules and regulations for the manufacture and handling of goods which are subjected to an internal revenue tax, Congress may prescribe any rule or regulation which is not in itself unreasonable; that it is a perfectly reasonable requirement that every package of such goods should contain nothing but the article which is taxed; that in order to make such a regulation constitutional it is not necessary that there be either expressly or by implication an exception of those articles or things which by virtue of their minute size or weight do not apparently affect the collection of the tax. Congress may rightfully make the prohibition absolute and the courts may not draw a line between the foreign substance, which is trifling in size or weight, and that which is of appreciable size and weight, and hold in reference to a particular package the act valid if the size or weight is appreciable and invalid if it is not.

Among the regulations prescribed by Congress in its internal revenue legislation are many which are purely arbitrary, or at least the necessity of which for the collection of taxes is not apparent. For instance, Congress has directed (Rev. Stat. 3392) that cigars shall be put up in boxes containing twenty-five, fifty, one hundred, two hundred and fifty, or five hundred each. There is no special efficacy in either of these numbers. Boxes containing fifteen, thirty or sixty cigars would apparently afford just the same facilities for taxation, and, and yet can there be a doubt that Congress may make such a rule and compel each manufacturer to abide thereby? It has a right to select, and when it has made a selection, although there may be no special reasons for the specific numbers, and they are in fact arbitrarily selected, it may for purposes of uniformity compel compliance with the rule. So, if it should prescribe that at least nine-tenths of every package, purporting to be a package of a particular kind of tobacco, and subject to a special tax, should be that particular kind of

tobacco, would the manufacturer be permitted to make one-third of the contents of some other kind of tobacco or any other substance? The proportion might be arbitrarily selected, it is true, but is it not clearly within the power of Congress in its regulations to make such arbitrary selection? And if it may say that not less than nine-tenths of the contents shall be that particular tobacco, the subject of the tax, is it any the less within the power of Congress to prescribe that there shall be nothing in the package save that tobacco?

Indeed, the admission that the government may require that the contents of a package shall be partly of the goods which it taxes is a concession that it may also require the entire contents to be such goods.

There is in this statute no trespass upon the manufacturer's right to fully advertise his goods or to offer with the utmost freedom inducements for their purchase. He can put into the box in which he ships his packages all the advertising material he sees fit. That which is required is that each separate package shall be in its entirety a package of tobacco, and only tobacco. Beyond that the manner in which he shall sell, or the advertisement he shall make of his tobacco after the tax has been paid, and the packages have been stamped, is a matter for him to determine.

We are of opinion that it is within the power of Congress to prescribe that a package of any article which it subjects to tax, and upon which it requires the affixing of a stamp, shall contain only the article which is subject to the tax.

Questions three and four do not come within the rules respecting the certification of questions by the Court of Appeals. Those rules were thus stated by the present Chief Justice in *United States* v. *Union Pacific Railway Company*, (168 U. S. 505, 512):

"It is settled that the certification provided for in sections five and six of the Judiciary Act of March 3, 1891, c. 517, 26 Stat. 826, is governed by the rules laid down in respect of certificates of division under the Revised Statutes. (*Columbus Watch Company* v. *Robbins*, 148 U. S. 266; *Maynard* v. *Hecht*, 151 U. S. 324; *Graver* v. *Faurot*, 162 U. S. 435; *Cross* v. *Evans*, 167 U. S. 60.)

"By those rules, as repeated in these cases from prior decisions, 'each question had to be a distinct point or proposition of law, clearly stated, so that it could be distinctly answered without regard to the other issues of law in the case; to be a question of law only, and not a question of fact, or of mixed law and fact, and hence could not involve or imply a conclusion or judgment upon the weight or effect of testimony or facts adduced in the case; and could not embrace the whole case, even where its decision turned upon matter of law only, and even though it was split up in the form of questions.' (*Fire Insurance Association* v. *Wickham*, 128 U. S. 426; *Dublin Township* v. *Milford Savings Institution*, 128 U. S. 510.)"

Neither of these questions presents a distinct point or proposition of law. Each invites us to search the entire record, and in effect determine whether

the judgment of the District Court should be affirmed or reversed. But as settled in the cases referred to in the last quotation, the Court of Appeals cannot thus send up a whole case for consideration and disposition.

We, therefore, answer the second question by saying that the coupons described are within the prohibition of the statute; the first, that the statute so construed is not in conflict with the Constitution of the United States. The third and fourth we decline to answer.

Mr. Justice GRAY and Mr. Justice WHITE did not hear the argument and took no part in the decision of this case.

Mr. Justice PECKHAM dissented.

True copy.

Test:

Clerk Supreme Court, U. S.